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K.S. BHOOPATHY AND ORS.

v.

KOKILA AND ORS.

MAY 8, 2000

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[A.P. MISRA AND D.P. MOHAPATRA, JJ.]

Code of Civil Procedure, 1908 :

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Order XXIII, Rule 1(3)—Withdrawal of suit—Suit for injunction filed to restrain running of flour mill and use of a pathway—Trial Court decreed suit in favour of respondent and gave them exclusive right of user over pathway—First Appellate Court quashed the exclusive right of user over pathway—Respondents sought permission to withdraw suit in second appeal before High Court in order to file fresh suit with additional prayer for declaration of title over pathway—High Court allowed the application—On appeal Held, there is distinction between withdrawal which is termed as “abandonment” and withdrawal with permission of Court—Grant of leave is discretion of the Court which is to be exercised with caution and circumspection—Court should feel satisfied regarding grounds of granting permission, statutory mandate not complied by merely stating that such permission will not prejudice defendants—Grant of leave at such stage would help unsuccessful plaintiff to avoid the decree against him and seek fresh adjudication on a clean slate—Permission to withdraw granted improperly, matter not considered in the proper perspective as it was for the plaintiffs to frame their suit properly at the proper time.

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Order II Rule 2 and Section 11—Bar on framing of suit and Res Judicata—Such bars avoided when liberty to withdraw suit is granted by Court under Order XXIII Rule 1.

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The respondents filed suit for injunction against the appellants to restrain them from establishing and running a flour mill and using the pathway lying between their properties. Trial Court decreed suit in favour of the respondents and gave them an exclusive right of user over the pathway. First appellate court modified the decree and held that respondent did not have an exclusive right of user over the pathway. Respondents filed the second appeal before the High Court, but before its admission an application was made under Order XXIII Rule 1(3) CPC seeking permission to withdraw the suit with leave to file a fresh suit as no prayer for

declaration of title over the pathway was made in the plaint. The application was allowed. Hence this appeal.

Appellant contended that the High Court erred in entertaining the application for withdrawal of the suit before admission of the second appeal, that no substantial question of laws was formulated during the second appeal; and that the application was entertained at a premature stage.

Respondent contended that the application was allowed after hearing both parties; and that High Court had a wide discretion to grant permission for withdrawal of the suit, which is not liable to be interfered under Article 136 of the Constitution.

Allowing the appeal, the Court

HELD : 1. Order XXIII Rule 1 CPC makes a distinction between absolute withdrawal which is termed as "abandonment" and withdrawal with the permission of the Court. The law as to withdrawal of suits as enacted in Order XIII Rule 1 may be generally stated in two parts : (a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court, in that case he will be precluded from suing again on the same cause of action. Neither the plaintiff can abandon a suit or a part of suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and (b) a plaintiff may, in the circumstances mentioned in Rule 1(3), be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the Court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC. [1174-E-H]

2. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non suit. On principle an application by a plaintiff under Rule 1(3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under Rule 1(1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. The grant of leave envisaged in Rule 1(3) is at the discretion of the Court but such discretion is to be exercised with caution and circumspection. The legislative policy in the matter of exercise of discretion is

A clear from the provisions of Rule 1(3) in which two alternatives are provided, Rule 1(3)(b) contains a mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision

B of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in

C the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on the clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/

D second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Another reason in support of this view is that withdrawal of a suit at

E the appellant/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of cases. [1175-A-H]

F *Bakhtawar Singh and Another v. Sada Kaur and Another*, [1996] 11 SCC 167 and *Executive Officer Arthaneswarar Temple v. R. Sathyamoorthy & Ors.*, [1999] 3 SCC 115, relied on.

G 3. The matter was not considered in the proper perspective while allowing the prayer to withdraw the suit with leave to file a fresh suit, where the prayer for declaration of title could also be made. It was for the plaintiffs to frame their suit in any form as advised and if the prayer for declaration of title was felt necessary the same should have been made. The plaintiffs had merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property and later on realised the weakness of their claim. The application under Order XXIII

H Rule 1(3) CPC was filed to get over the findings against them. The approach

that the interests of the defendants were safeguarded by giving them permission for user of the pathway till adjudication of the fresh suit to be filed is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit leave to file fresh suit and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. If permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses the benefit of the decision in his favour in the lower court. [1177-F-H; 1178-A-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3287 of 2000.

From the Judgment and Order dated 21.8.98 of the Madras High Court in C.M.P. No. 1985 of 1997 in S.A. No. 807 of 1996.

Y. Prabhakar, Radha Krishnan and Revathy Raghavan for the Appellants.

S. Sivasubramaniam and R. Nedumaran for the Respondents.

The Judgment of the Court was delivered by

D.P. MOHAPATRA, J. Leave granted.

This appeal filed by the defendants is directed against the judgment/order of the Madras High Court in Second Appeal No. 807 of 1996 and CMP Nos. 7569/96 and 1085/96, along with the application filed by the respondents 1 & 2 under Order XXIII Rule 1(3) Civil Procedure Code (CPC for short) seeking permission of the Court to withdraw the suit with leave to file a fresh suit.

The factual matrix of the case relevant for appreciation of the questions raised in the appeal may be stated thus : Respondents 1 & 2 herein filed O.S. No. 197/89 (subsequently re-numbered as 614/89) in the Court of the District Munsif, Erode arraying the appellants and respondents 3 & 4 as defendants in the suit. In the said suit the plaintiffs sought relief *inter alia*, of injunction against defendants 1 & 2 restraining them from establishing and running a flour mill, on their property and for further injunction restraining them from disturbing the plaintiffs' exclusive user of the pathway lying between the properties of the plaintiffs on one side and defendants 1 & 2 on the other.

A Defendants 1 & 2 in the suit as owners sold portions of their land by separate sale deeds dated 10.8.78 executed in favour of plaintiffs 1 & 2 which were shown in the map attached to the plaint in blue and green colours respectively. The pathway is similarly shown in red colour in the map. It was the case of the plaintiffs that establishment of the proposed flour mill by the defendants 1 & 2 will act as a nuisance and will seriously prejudice the plaintiffs' user of their property on which they have constructed a clinic. Regarding the pathway the case of the plaintiffs is that they have exclusive right of user of the same and the plaintiffs should not be permitted to interfere with their right in any manner.

C The defendants 1 and 2 refuted the claims of the plaintiffs in respect of both the prayers and contended that the proposed flour mill will in no way act as a nuisance against user of the property by the plaintiffs and that the plaintiffs have no exclusive right of user of the pathway which is a common pathway meant to be used by both the parties.

D The trial court decreed the suit holding *inter alia* that the plaintiffs have an exclusive right of user over the pathway. The trial court also accepted the case of the plaintiffs in respect of the prayer for injuncting contesting defendants from establishing a flour mill on their property.

E On appeal by defendants 1 & 2 the first appellate court modified the decree relating to the pathway holding that the plaintiffs have no exclusive right of user of the pathway and all the parties are entitled to use the same as it is a common path way.

F Being aggrieved by the modification of the decree to the extent noted above the plaintiffs filed the second appeal, S.A. No. 807/96, before the High Court of Madras. Before the said appeal was admitted the appellants filed an application under Order XXIII Rule 1(3) CPC seeking permission of the Court to withdraw the suit with leave to file a fresh suit. It was averred in the application, *inter alia*, that no prayer for declaration of plaintiffs' title over the pathway was made in the plaint and in view of the cloud raised against their exclusive title and right of user in the judgment of the lower appellate court it was necessary to withdraw the suit and file a fresh suit properly constituted and seeking appropriate relief. The contesting defendants objected to the prayer in the application on the ground, *inter alia*, that it was a move by the plaintiffs to get over the finding that they have no exclusive right of user over the suit pathway and that the defendants have also a right of user

of the same since it is a common pathway meant to be used by the parties. According to the defendants in the circumstances the permission sought for withdrawal of the suit with leave to file a fresh suit according to the defendants could not be granted. The application filed by the appellants was allowed by the High Court in the impugned order.

The main thrust of the arguments of learned senior counsel for the appellants was that the High Court erred in entertaining the application under Order XXIII Rule 1(3) CPC at a stage when the second appeal had not been admitted. The High Court had not formulated any substantial question of law which required examination in the second appeal. Elucidating his contention the learned senior counsel submitted that the provision in section 100 CPC makes it mandatory for the Court to formulate the substantial question of law to be examined in appeal before admitting the same. That having not been done in the present case the application filed under Order XXIII Rule 1(3) CPC was premature.

Learned counsel appearing for the plaintiff-respondents on the other hand submitted that the High Court heard both the parties before granting the application for withdrawal of the suit with leave to file fresh suit, and therefore, no exception can be taken to the order that it was premature. It was the further submission of the learned counsel that Order XXIII Rule 1(3) vests wide discretion in the Court to grant permission for withdrawal of the suit with leave to file a fresh suit and such discretion having been exercised by the High Court in favour of the applicants the order is not liable to be interfered by this Court in exercise of jurisdiction under Article 136 of the Constitution.

Order XXIII Rule 1 CPC makes provisions for withdrawal of suit or abandonment of part of claim. Relevant portions of the provision are extracted hereunder :

Order XXIII

“Withdrawal and Adjustment of Suits

(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,

A neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(3) *Where the Court is satisfied. -*

B (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.*

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(4) Where the plaintiff -

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

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(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.”

(Emphasis supplied)

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The present Rule which was introduced in place of the old Rule 1 by the Amendment Act of 1976 makes a distinction between absolute withdrawal which is termed as ‘adandonment’ and withdrawal with the permission of the Court. This clear distinction is maintained throughout in the substituted Rule by making appropriate changes in the wording of various sub-rules of Rule 1.

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The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts : (a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court, in that case he will be precluded from suing again on the same cause of action. Neither the plaintiff can abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and (b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action.

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Such liberty being granted by the Court enables the plaintiff to avoid the bar

in Order II Rule 2 and Section 11 CPC.

The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non suit. Therefore on principle an application by a plaintiff under sub-rule 3 cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule 1. In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existences of the circumstances justifying the grant of the such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and *inordinate* delay in disposal of the cases.

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A In *Bakhatawar Singh and Another v. Sada Kaur and Another*, [1996] 11 SCC 167 the question of grant of permission under clause (3) of Order XXIII Rule 1 of the CPC was considered wherein it was held :

B “In the present case all the courts below including the High Court concurrently found that the plaintiffs/appellants failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject-matter. The plaintiffs had not even produced the application which is said to have been filed for withdrawal of the earlier suit with permission to file a fresh suit on the same cause of action to show as to what was the formal defect in the earlier suit by reason of which it was sought to be withdrawn. In these facts and circumstances no case for fresh institution of suit on the same cause of action and for the same relief after the withdrawal of the earlier suit was made out by the plaintiffs/appellants in accordance with the provisions of clause (3) of Order 23 Rule 1 of the Code.”

Recently in the case of *Executive Officer Arthaneswarar Temple v. R. Sathyamoorthy & Ors.*, [1999] 3 SCC 115 this Court restated the general principles for dealing with the applications under Order XXIII Rule 1 CPC in the following words :

F “Various High Courts have rightly held, while dealing with applications under Order 23 Rule 1 CPC, that if an appeal was preferred by an unsuccessful plaintiff against the judgment of the trial court dismissing the suit and if the appellant-plaintiff wanted to withdraw not only the appeal but also the suit unconditionally, then such a permission so far as the withdrawal of the suit was concerned, can be granted if there was no question of any adjudication on merits in favour of the defendants by the trial being nullified by such withdrawal. On the other hand, if any such findings by the trial court in favour of the defendant would get nullified, such permission for withdrawal of the suit should not be granted.”

H The question for consideration in the present case is whether the High Court has exercised the discretion vested under Order XXIII Rule 1(3) CPC on consideration of matters relevant for exercise of such power. On perusal

of the impugned order it is clear to us that the learned judge has not considered the matter in its proper perspective while allowing the prayer of the plaintiff for permission to withdraw the suit with leave to file a fresh suit. The order is vitiated on account of non-application of mind to the relevant aspects of the matter. This position is clear from some observations in the impugned order which are extracted herein below :

“But one fact situation has to be remembered in this case, viz., that it was the appellants who succeeded in the trial court in obtaining a decree and in the appeal against such decree by the respondents, which was partly allowed, the appellate court found that the pathway was common to both the parties, but the right was not gone into, title was not determined, in such a situation withdrawal of the suit at the appellate stage although it may amount to withdrawal or nullification of the appellate court’s order, still not hurt any part other than the withdrawing plaintiffs, because they are also having the right to use the common pathway and the decree preventing installation of the machinery is nullified. Therefore the contention, that withdrawal will prejudice the Respondents, has no basis. The apprehended prejudice can be safeguarded by keeping the right to use the pathway by both the parties till the disposal of the suit.

.....In view of this settled position, it is appropriate to permit withdrawal of the suit with a liberty to file a fresh suit for declaration of title which they ought to have done at the initial stage. By withdrawal, the Respondents should not be deprived of the benefit of usage of that passage till the final adjudication. If there are valid defences, they can raise all such defences.”

From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial

A court and the first appellate court it is clear that the plaintiffs realised the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate court they took recourse of Order XXIII Rule 1(3) CPC and filed the application for withdrawal of the suit with leave to file fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the Court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at appellate or second appellate stage prejudice to defendant is writ large as he loses the benefit of the decision in his favour in the lower court.

For the reasons discussed in the foregoing paragraphs we have no hesitation to hold that the impugned order is unsustainable. Accordingly the appeal is allowed with cost. The order of the High Court dated 21.8.1998 granting permission for withdrawal of the suit with permission to file fresh suit is set aside. The High Court will now proceed to dispose of the second appeal in accordance with law.

A.Q.

Appeal allowed.