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ANIL KUMAR SINGH

v.

VIJAY PAL SINGH & ORS.

(Civil Appeal No. 20007 of 2017)

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NOVEMBER 30, 2017

**[R. K. AGRAWAL AND ABHAY MANOHAR SAPRE, JJ.]**

*Code of Civil Procedure, 1908:*

*Order XXIII, r. 1 – Application under – Seeking permission to*

- C *withdraw suit for injunction – Allowed by trial court and affirmed by Revision Court – In writ petition by defendant, High Court set aside the orders of trial court and revision court and directed the plaintiff to put the defendant in possession of the suit land – On appeal, held: The writ petition was confined to the question of withdrawal of the suit and not of grant of injunction – The High Court committed jurisdictional error by going beyond the scope of the writ petition having travelled in the issue relating to grant of injunction in respect of the suit land – Trial Court and Revision Court were justified in permitting the plaintiff to withdraw the suit – High Court was not right in setting aside their orders and directing E to place defendant No. 1 in possession of the suit land.*
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**Allowing the appeal, the Court**

**HELD: 1. When the plaintiff files an application under Order**

- XXIII Rule 1 CPC and prays for permission to withdraw the suit, whether in full or part, he is always at liberty to do so and in such F case, the defendant has no right to raise any objection to such prayer being made by the plaintiff except to ask for payment of the cost to him by the plaintiff as provided in sub-rule (4). The reason is that while making a prayer to withdraw the suit under Rule 1(1), the plaintiff does not ask for any leave to file a fresh G suit on the same subject matter. A mere withdrawal of the suit without asking for anything more can, therefore, be always permitted. [Paras 24, 25][81-C-D]**

**2. However, when the plaintiff applies for withdrawal of the suit along with a prayer to grant him permission to file a fresh**

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suit on the same subject matter as provided in sub-rule (3) of Rule 1 then in such event, the defendant can object to such prayer made by the plaintiff. In such event, it is for the Court to decide as to whether the permission to seek withdrawal of the suit should be granted to the plaintiff and, if so, on what terms as provided in sub-rule (3) of Rule 1. [Para 26][81-E-F] A

3. In the present case, since the appellant had applied for withdrawal of the suit under Order XXIII Rule 1, the Trial Court was justified in permitting withdrawal of the suit subject to the appellant paying cost of Rs.350/- to respondent No.1 (defendant No.1). Such order was in conformity with sub-rule (3) of Rule 1 and was rightly upheld by the Revision Court. [Para 27][81-G-H] B

4. The High Court committed jurisdictional error in allowing the defendant's writ petition by finding fault in the orders of the Trial Court and Revision Court and giving directions to the plaintiff to place defendant No.1 in possession of the suit land without there being any basis whatsoever. The High Court should have seen that the scope of writ petition was confined to examine the question as to whether the Trial Court and Revision Court were justified in allowing the application filed by the plaintiff under Order XXIII Rule 1 CPC and to decide this question, the High Court should have confined its inquiry to examine as to whether the requirements of Order XXIII Rule 1 were complied with or not but not beyond it. There was, therefore, no justification on the part of the High Court to have travelled in the issues relating to the grant of injunction in relation to the suit land and give direction to the appellant (plaintiff) to place respondent No. 1 in possession of the suit land. [Paras 28, 29 and 30][82-A-D] C D

5. The High Court should have seen that the issue of grant of injunction was not the subject matter of the writ petition and, therefore, it had nothing to do with the question of grant of injunction and secondly, the withdrawal of a suit was governed by Order XXIII Rule 1 CPC whereas the injunction was governed by Order XXXIX Rules 1 and 2 CPC. Both operate in different spheres. That apart, the defendant did not challenge the *ex-parte* grant of injunction order in appeal under Order XLIII Rule 1(r) and nor contested it before the Trial Court. It was only in these E F G

A **two forums, the issue of injunction could be considered by the Courts but not in present proceedings which were confined only to the question of withdrawal of suit and nothing else. [Para 31][82-D-F]**

B **6. The Trial Court and the Revision Court were justified in permitting the appellant (plaintiff) to withdraw the suit whereas the High Court was not right in setting aside the orders of the Revision Court and the Trial Court and giving directions to place defendant No.1 in possession of the suit land. [Para 32][82-F-G]**

**CIVIL APPELLATE JURISDICTION: Civil Appeal No. 20007  
C of 2017.**

From the Judgment and Order dated 28.05.2010 of the High Court of Judicature at Allahabad, Lucknow Bench in WP No. 5453 of 2008.

Pradeep Kant, Sr. Adv., Divyanshu Sahay, Sunil Kumar Jain, Sanjay Goel, Sanjay Kumar Singh, Kaushik Choudhary, Advs. for the Appellant.

D **Anurag Kishore, Mordhwaj Singh, Nikhil Jain, Rajesh Kumar, Advs. for the Respondents.**

The Judgment of the Court was delivered by

**ABHAY MANOHAR SAPRE, J.** 1. Leave granted.

E **2. This appeal is filed by the plaintiff against the final judgment and order dated 28.05.2010 passed by the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 5453(M/S) of 2008 whereby the High Court allowed the petition filed by respondent No.1 herein and set aside the order dated 14.08.2007 passed by the**

F **Additional Civil Judge (Jr. Division) I, Hardoi in R.S. No.271 of 2006 and order dated 05.08.2008 passed by the Additional District Judge-III, Hardoi in C.R. No.63 of 2007.**

G **3. In order to appreciate the issues arising in the case, it is necessary to set out the facts infra. The facts set out hereinbelow are taken from the SLP paper book.**

**4. The appellant is the plaintiff whereas respondent Nos.1 to 4 are defendant Nos.1 to 4 and respondent No.5 is plaintiff No.2 as proforma respondent.**

H **5. The dispute in this case is essentially between the appellant**

and respondent Nos. 1 to 4 and relates to a land bearing number 629-A/ 0.0320 Hect. and 629-B/1.5820 hect. situated in village - Asyoli Pargana, Bangar, Tehsil and District Hardoi (UP) (hereinafter referred to as "suit land").

6. The suit land claimed to be originally belonged to one Shri Jinta s/o Dhamma. He sold it to two persons - Abhishek Singh and Ajit Pratap Singh. Abhishek Singh then claimed to have sold his half share to the appellant on 25.02.2003 whereas Ajit Pratap Singh had already sold his half share to one Khanulal Mishra on 15.11.2000. Khanulal then claimed to have sold his 1/4<sup>th</sup> share out of his share to the appellant and remaining half share to Ajit Pratap Singh on 04.06.2003. In this way, the appellant claimed to become the owner of the suit land to the extent of 3/4<sup>th</sup> and remaining 1/4<sup>th</sup> fell to the share of Ajit Pratap Singh. The mutation of the names of the owners of the suit land on their respective shares was accordingly claimed to have been done.

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7. The appellant claimed to be doing business of making brick kiln on the suit land after purchase of the suit land in partnership with respondent No.5 under the name - M/s Sushma Brick Field.

8. In May 2006, the appellant (plaintiff) filed a suit being Civil Suit No.271/2006 in the Court of First Additional Civil Judge, Hardoi and claimed permanent injunction restraining respondent No. 1 from interfering in his possession over the portion of the suit land. The appellant also applied for grant of temporary injunction under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (hereinafter referred to as "the Code") against respondent No. 1 from interfering in his possession over the portion of the suit land which he claimed to have purchased.

9. On 31.05.2006, the Trial Court granted *ex-parte* temporary injunction restraining respondent No.1 from interfering in appellant's possession over the portion of the suit land as claimed and issued notice of the suit and the application made for grant of temporary injunction to respondent No.1. The appellant, in the meantime, also applied for police protection to ensure that order dated 31.05.2006 is not violated by respondent No.1 which was granted on 12.07.2006.

10. In the meantime, parties claimed to have entered into a compromise wherein respondent No.1 agreed not to interfere in appellant's possession. The appellant accordingly filed an application under Order XXIII Rule 1 to withdraw the suit. Respondent No.1 opposed the

A application. By order dated 14.08.2007, the Trial Court allowed the application and permitted the appellant to withdraw the suit subject to payment of cost of Rs.350/- payable to respondent No.1 (defendant No.1). The appellant's suit was accordingly dismissed as withdrawn. The order reads as under:

B "Case was called out. The parties are present. The object of 61 C2 has been filed by the O.P. against the 56C2, let the same be included with record. Heard. The application is returned on costs of Rs.350/- with the condition that there shall be restriction on plaintiff to bring any other further suit regarding the subject matter of present case on this cause of action. The objections 61C2 stands disposed of accordingly.

Let the case be consigned to record room after necessary proceeding."

D 11. Respondent No.1 felt aggrieved and filed revision under Section 115 of the Code before the Additional District Judge, Hardoi. By order dated 05.08.2008, the Additional District Judge dismissed the revision and upheld the order of the Trial Court.

E 12. Respondent No.1 felt aggrieved and filed writ petition (W.P. No.5453/2008) in the High Court at Allahabad against the order of the Additional District Judge under Article 227 of the Constitution of India. By order dated 28.05.2010, the High Court allowed the respondent's writ petition, set aside the orders of Additional District Judge and the Trial Court and also directed the appellant (plaintiff) to place respondent No.1 (defendant No.1) in possession of the suit land.

F 13. It is against this order, the plaintiff felt aggrieved and filed this appeal by way of special leave in this Court.

G 14. Heard Mr. Pradeep Kant, learned senior counsel for the appellant and Mr. Anurag Kishore, Mr. Nikhil Jain and Mr. Rajesh Kumar, learned counsel for the respondents.

H 15. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow the appeal, set aside the impugned order and restore the orders of the Trial Court and the Revision Court.

I 16. The short question, which arose for consideration before the

High Court in the writ petition filed by defendant No.1 (respondent No.1 herein) was whether the two Courts below were justified in allowing the application filed by the appellant (plaintiff) under Order XXIII Rule 1 of the Code and thereby justified in permitting the appellant (plaintiff) to withdraw the suit. A

17. In other words, the only question, which the High Court was called upon to examine in the writ petition, was whether the appellant's (plaintiff's) application filed under Order XXIII Rule 1 of the Code praying for permission to withdraw the suit was rightly allowed by the Trial Court or not. B

18. Order XXIII Rule 1, which is relevant to decide the question, C reads as under:

**“Order XXIII Rule 1**

1. **Withdrawal of suit or abandonment of part of claim-** (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: D

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

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person. F

(3) Where the court is satisfied,-

(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, G

it may, on such terms as it thinks fit, grant the plaintiff

A 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.

**(4) Where the plaintiff-**

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

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

C 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.

D (5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs."

E 19. Reading of Order XXIII Rule 1 would go to show that the plaintiff has a right to file an application to abandon his suit or part thereof at any time after its filing. However, if the permission to withdraw the suit, whether full or part thereof is granted under Rule 1(3), then the plaintiff would be granted liberty to institute a fresh suit on terms as the Court may deem fit and proper to impose on the plaintiff in respect of the same subject matter of the suit or part thereof.

F 20. If the permission to withdraw the suit is granted under sub-rule(1) of Rule 1 read with sub-rule (4)(a) or (b) then in such event, the plaintiff would only be liable to pay cost to the defendant. However, in such situation, he is precluded from filing a fresh suit in respect of the same subject matter or part thereof.

G 21. Sub-rule (5) of Rule 1 says that, if there are more than one plaintiff then unless all the plaintiffs give consent to withdraw the suit, the permission to withdraw the suit cannot be granted under sub-rule (1) or (3).

H 22. Coming to the facts of the case on hand, we find that the appellant (plaintiff) had applied for withdrawal of his suit under Order XXIII Rule 1. The Trial Court acceded to the prayer and accordingly

granted permission to the appellant to withdraw the suit on payment of cost of Rs.350/- to the defendants. This the Trial Court did by taking recourse to the powers conferred under Order XXIII sub-rule (4)(a) of Rule 1.

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23. The effect of this grant of permission to the appellant was that though he was allowed to withdraw the suit but was not permitted to file a fresh suit on the same subject matter. Since only one person had filed the suit and, therefore, sub-rule (5) of Rule 1 was not attracted.

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24. In our considered opinion, when the plaintiff files an application under Order XXIII Rule 1 and prays for permission to withdraw the suit, whether in full or part, he is always at liberty to do so and in such case, the defendant has no right to raise any objection to such prayer being made by the plaintiff except to ask for payment of the cost to him by the plaintiff as provided in sub-rule (4).

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25. The reason is that while making a prayer to withdraw the suit under Rule 1(1), the plaintiff does not ask for any leave to file a fresh suit on the same subject matter. A mere withdrawal of the suit without asking for anything more can, therefore, be always permitted. In other words, the defendant has no right to compel the plaintiff to prosecute the suit by opposing the withdrawal of suit sought by the plaintiff except to claim the cost for filing a suit against him.

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26. However, when the plaintiff applies for withdrawal of the suit along with a prayer to grant him permission to file a fresh suit on the same subject matter as provided in sub-rule (3) of Rule 1 then in such event, the defendant can object to such prayer made by the plaintiff. In such event, it is for the Court to decide as to whether the permission to seek withdrawal of the suit should be granted to the plaintiff and, if so, on what terms as provided in sub-rule (3) of Rule 1.

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27. Now coming to the facts of the case, we are of the considered opinion that the Trial Court and the Revision Court (A.D.J) were justified in permitting the appellant (plaintiff) to withdraw the suit under sub-rule (1) of Rule 1. In other words, since the appellant had applied for withdrawal of the suit under Order XXIII Rule 1, the Trial Court was justified in permitting withdrawal of the suit subject to the appellant paying cost of Rs.350/- to respondent No.1 (defendant No.1). Such order, in our view, was in conformity with sub-rule (3) of Rule 1 and was rightly upheld by the Revision Court.

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A 28. The High Court, however, committed jurisdictional error in allowing the defendant's writ petition by finding fault in the orders of the Trial Court and Revision Court and giving directions to the plaintiff to place defendant No.1 in possession of the suit land without there being any basis whatsoever.

B 29. As mentioned above, the High Court should have seen that the scope of writ petition was confined to examine the question as to whether the Trial Court and Revision Court were justified in allowing the application filed by the plaintiff under Order XXIII Rule 1 of the Code and to decide this question, the High Court should have confined its inquiry to examine as to whether the requirements of Order XXIII Rule 1 were complied with or not but not beyond it.

C 30. There was, therefore, no justification on the part of the High Court to have travelled in the issues relating to the grant of injunction in relation to the suit land and give direction to the appellant (plaintiff) to place respondent No. 1 in possession of the suit land.

D 31. The High Court should have seen that the issue of grant of injunction was not the subject matter of the writ petition and, therefore, it had nothing to do with the question of grant of injunction and secondly, the withdrawal of a suit was governed by Order XXIII Rule 1 of the Code whereas the injunction was governed by Order XXXIX Rules 1 and 2 of the Code. Both operate in different spheres. That apart, the defendant did not challenge the *ex-parte* grant of injunction order in appeal under Order XLIII Rule 1(r) and nor contested it before the Trial Court. It was only in these two forums, the issue of injunction could be considered by the Courts but not in present proceedings which, as mentioned above, were confined only to the question of withdrawal of suit and nothing else.

E 32. In the light of foregoing discussion, we are of the considered opinion that the Trial Court and the Revision Court were justified in permitting the appellant (plaintiff) to withdraw the suit whereas the High Court was not right in setting aside the orders of the Revision Court and the Trial Court and giving directions to place defendant No.1 in possession of the suit land.

F 33. We, however, make it clear that defendant No.1 would be at liberty to raise issues relating to his ownership and possession in relation to the suit land in appropriate proceedings in accordance with law.

34. In view of foregoing discussion, the appeal thus succeeds and is allowed. Impugned order is set aside and the orders of the Trial Court and the Revision Court are restored.

Kalpana K. Tripathy

Appeal allowed.

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