(2012) 12 AHC CK 0066

Allahabad High Court

Case No: C.M.W.P. No. 58985 of 2012

Bhajan Lal and others	APPELLANT
Vs	
Smt. Rajmala	RESPONDENT

Date of Decision: Dec. 6, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 89(2), Order 23 Rule 1, Order 32 Rule 1, Order 32 Rule 14, 151

Citation: (2013) 4 ADJ 261 : (2013) 2 ALJ 476 : (2013) 2 AWC 1405

Hon'ble Judges: A.P. Sahi, J

Bench: Single Bench

Advocate: Tripathi B.G. Bhai, for the Appellant; Amit Manohar, for the Respondent

Final Decision: Allowed

Judgement

A.P. Sahi, J.

This petition has raised an issue of the right of a litigant, in this case a plaintiff, to revoke his right which he has exercised for withdrawing the Suit under Order XXIII. Rule 1 of the Civil Procedure Code, which has to be adjudicated in the light of the provision aforesaid coupled with the pronouncements of this Court, other High Courts as well as the Apex Court on the anvil of the ratio of the said decisions, and the scope and applicability of the powers conferred on the civil court u/s 151, C.P.C. in dealing with such matters. The outline of the facts of the present case in brief are that the petitioners are the plaintiffs in Original Suit No. 11 of 2010 where the sole respondent is the only defendant. The relief claimed in the Suit is that the defendant be restrained by way of a permanent injunction from alienating the land in dispute to any third party and not to interfere in the possession of the plaintiffs. A copy of the plaint has been filed as Annexure-1 which indicates that the disputed property is a plot over which residential constructions have been raised that belonged to Late Kamta Prasad, the real brother of the petitioners-plaintiffs.

2. The sole respondent is stated to be the daughter of the plaintiff/petitioner No. 1 - Bhajan Lal who got her name mutated over the said property in collusion with the revenue officials on the pretext of having inherited the same from her uncle and was attempting to sell of the same when the Suit came to be filed. Sri Kamta Prasad had died issue-less and, therefore, the plaintiffs-petitioners claimed that they being the brothers are entitled to claim the said property.

3. An application for interim relief was filed and an ad-interim injunction was granted on 6.1.2010 directing the parties to maintain status-quo and not to alienate the property in dispute.

4. Shortly, thereafter, application No. 30A-1 was filed by the plaintiffs praying that on account of the intervention of some respectable persons of the locality, the parties have entered into a compromise in a panchayat decision and, therefore, the plaintiffs do not want to further pursue the Suit. This application was filed alongwith an affidavit of the plaintiff No. 1 - Bhajan Lal that was accompanied by a document of compromise signed by the plaintiffs and by the defendant-respondent; copy whereof has been filed a Annexure-5 to the writ petition.

5. The defendant-Rajmala declared that she was the real daughter of plaintiff-petitioner No. 1 and that she is not the daughter of Kamta Prasad. She further stated that the disputed property is to be given to the plaintiffs-petitioners and she does not want to contest the Suit. She further prayed for vacating the interim injunction which application was kept pending and dates were fixed for leading evidence. It appears that an affidavit was filed by the defendant-respondent on 22.2.2011 where again she stated that Kamta Prasad was issue-less and that she is the daughter of plaintiff-petitioner No. 1 Bhajan Lal. She further stated that the disputed property is in possession of her father and uncles and she has no concern with the same. She alleged that the Suit has been filed with a view to harass her and, therefore, the Suit should be dismissed with costs.

6. On 3.8.2011. the lawyer for the plaintiffs made an endorsement on the said application No. 30A-1 that the said application for withdrawal of the Suit is not pressed. This endorsement was preceded by an application that was filed on 15.3.2010, being application No. 32C-2, wherein the plaintiffs had prayed that they do not want to press their withdrawal application for which permission be granted. As noted above, dates were fixed on 4.8.2010, 25.8.2010 up to 3.8.2011 and issues were framed in the Suit where after the parties were to lead evidence.

7. It appears that the trial court noticed the pendency of these applications and proceeded to pass the impugned order on 18.8.2012 after noticing the argument of either side and allowed application No. 30A-1. The endorsement of not pressed was set aside and the Suit was dismissed as withdrawn.

8. The plaintiffs filed a revision contending that they had a right to revoke their intention to withdraw the Suit which they had already exercised by moving the

application on 15.3.2010 (Application No. 32C-2) and also by making an endorsement on 3.8.2011. They also relied on the Supreme Court decision in the case of Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and Others, to support their stand apart from the other decisions which have been cited at the Bar. The revisional court, relying on the decision in the case of Smt. Raisa Sultana Begam and Others Vs. Abdul Qadir and Others, held that once the right to withdraw has been exercised, the Suit will be presumed to have been abandoned and no further orders are required from the Court insofar as the plaintiff is concerned, who will be deemed to have abandoned the claim unconditionally. The revisional court accepted the contention of the defendant and upheld the order of the trial court against which the present writ petition has been filed.

9. The matter was heard on an earlier occasion and the following orders were passed on 21.11.2012 extracted hereunder: -

Heard Sri Tripathi B.G. Bhai, learned counsel for the petitioners and Sri Amit Manohar learned counsel for the respondent -opposite party.

The petitioners are plaintiffs in a Suit for permanent injunction where also a prayer has been made for restraining the defendant from alienating the property in dispute. Original Suit No. 11 of 2010 was instituted on 5.1.2010 and an ad-interim injunction was also granted to the petitioners-plaintiffs on 6.1.2010.

Two months thereafter an application was filed bearing No. 30A on 6.3.2010 praying for an unconditional withdrawal of the Suit. This application was filed by all the plaintiffs.

It appears that there was some change of heart and on 3.8.2011, an endorsement was made by the learned counsel for the plaintiffs on the said application that they do not want to press the said application. This endorsement was pursuant to an application already filed by the plaintiffs to the said effect on 15.3.2010 numbered as Paper No. 33 - C (2). It was categorically stated in the said application that the plaintiffs do not propose to press their earlier application for withdrawal dated 6.3.2010.

It appears that no orders were passed on either of these two applications and the court proceeded with the case by framing issues on 4.8.2010 whereafter dates were fixed for evidence on 25.8.2010 and even thereafter till 3.8.2011.

The Court then proceeded to fix dates for disposal of application No. 30A and the trial court on 18.8.2012 set aside the endorsement of "not pressed" by the petitioners-plaintiffs and in effect rejected application No. 33 - C (2). and allowed application No. 30A permitting withdrawal of the suit. The trial court, while passing the order, relied on two judgments of this Court namely Smt. Smt. Raisa Sultana Begam and Others Vs. Abdul Qadir and Others, and a Division Bench Judgment in the case of Sheikh Khalikuzzama (D) through L.Rs. and Others Vs. Sheikh

Akhtaruzzama (D) and Others, The trial court found that once the plaintiffs have abandoned their claim, they cannot be permitted to file any application for withdrawing the application of abandonment.

Aggrieved the plaintiffs filed a Revision which has also been dismissed after noticing the judgment in the case of The Executive Officer, Arthanareswarar Temple Vs. R. Sathyamoorthy and Others, and the judgment of the Apex Court in the case of Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and Others,

The revisional court endorsed the view taken by the trial court by following the decision of Smt. Raisa Sultana Begam (supra) and accordingly rejected the revision.

Learned counsel for the petitioners contends that the aforesaid decisions have been rendered ignoring the provisions of Section 151, C.P.C. which have been found to be applicable and for which reliance is placed by the learned counsel for the petitioners on the decision of Rajendra Prasad Gupta (supra) to contend that the judgment clearly holds that an application praying for withdrawal of the application to abandon the Suit was maintainable. Sri Tripathi, therefore, submits that inspite of having noticed the said judgment, the revisional court has taken an erroneous view and, therefore, the impugned orders deserve to be set aside. Learned counsel has further relied on the decision in the case of Jet Ply Wood Private Ltd. and Another Vs. Madhukar Nowlakha and Others, which has relied on the judgment of Calcutta High Court in the case of Rameswar Sarkar Vs. State of West Bengal and Others, to substantiate his submission that there is no specific provision for moving such an application under the CPC and, therefore, the application can be moved u/s 151, C.P.C. and entertained.

Replying to the said submissions, Sri Amit Manohar, learned counsel for the opposite party, contends that the judgment of this Court in the case of Smt. Raisa Sultana Begam as followed in the case of Sheikh Khalikuzzama (supra) lays down the correct law which finds reflection and support from another decision of the Apex Court in the case of K.S. Bhoopathy and Others Vs. Kokila and Others, Learned counsel, therefore, contends that the said judgments clearly explain the language of Order XXIII, Rule 1, C.P.C. which is in turn supported by the decision in the case of Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co.,

Further decisions of other High Courts of the country have also been relied upon by the learned counsel to submit that the withdrawal is absolute once an intention to abandon the claim has been expressed which does not require the passing of any formal order of the Court. The contention, therefore, is that once the intention has been expressed, a subsequent application for withdrawing the said application cannot be entertained and the absolute right of abandonment stands accrued with the moving of the application and thereafter correspondingly a right vests in the defendant on account of the withdrawal of the Suit. Learned counsel, therefore, contends that neither the trial court nor the revisional court has committed any

illegality and the orders passed are perfectly in consonance with Rule 1 of Order XXIII of the Civil Procedure Code.

Having heard learned counsel for the parties and keeping in view the submissions raised, there appears to be a conflict of opinion between different High Courts and the following judgments have been brought to the notice of this Court -

(i) Bharat Bhushan Gupta Vs. Raj Kumar Gupta,

(ii) State Bank of India Vs. Firm Jamuna Prasad Jaiswal and Sons,

(iii) Sicom Ltd. Vs. Prashant S. Tanna and Others,

(iv) Mahadkar Agency and Another Vs. Padmakar Achanna Shetty,

(v) Nila Bauart Engineering Ltd. Vs. Rajasthan Urban Infrastructureproject AVS Building,

(vi) Thakur Pehp Singh Vs. Thakur Prathvi Singh and Others,

(vii) Mrs. Pushpa Devi Vs. Rajeev Kharbanda.,

(viii) Kedar Nath and Others Vs. Chandra Kiran and Others, and

(ix) Vidhydhar Dube and Others Vs. Har Charan and Others,

Having noticed the aforesaid decisions, there appears to be an apparent difference of opinion between the two judgments of the Apex Court in the case of K.S. Bhoopathy (supra) where in paragraph No. 10, the following opinion has been expressed: -

10. 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 ''abandonment'' 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.

To the contrary the judgment in the case of Rajendra Prasad Gupta (supra) clearly invokes the powers of Section 151. C.P.C. in favour of the petitioners plaintiffs. In the aforesaid circumstances, what appears is that the law laid down by the Division Bench of Allahabad High Court in the case of Smt. Raisa Sultana Begam (supra) has not been noticed by the Apex Court in the case of Rajendra Prasad Gupta (supra) and the judgment has been delivered on the basis of the view expressed by an earlier Full Bench in the case of Nursing Das v. Mangal Dubey, (1885) ILR 5 All 563.

This decision of the Apex Court has not noticed the opinion expressed by the Apex Court in the case of K.S. Bhoopathy (supra) where the application was moved for withdrawing the Suit with liberty to file a fresh Suit. Nonetheless, while proceeding to decide the said case, the Supreme Court did make the observation in paragraph No. 10 as extracted hereinabove which has not been noticed by the subsequent

decision of the same strength by the Apex Court.

In my opinion, the matter should be viewed from the angle that once a claim is abandoned unilaterally, then the power of the Court to dispose of such an application is limited only to the extent of the prescription made under Order XXIII. The Court cannot alter the intention of the plaintiffs but can impose any condition or costs or may refuse to allow an application on other aspects as entailed in Order XXIII. For example, that an application filed in a Suit for partition cannot be allowed for withdrawing the entire Suit as all the parties to the Suit have an equal interest as that of the plaintiffs. Other than this also if there are several plaintiffs then the abandonment cannot be permitted unless the other plaintiffs'' consent is obtained. There are other contingencies like intervention of 3rd party rights and pendency of counter-claims in the same suit.

In the instant case, it is clear that all the plaintiffs had jointly moved an application for abandoning their claim. The abandonment was clearly intended by all the plaintiffs. The law on the subject, therefore, as is available from other High Courts and the judgment relied upon by the learned counsel for the respondent is clearly to the effect that such an application is only a declaration of that intention and does not require the passing of any formal order. The abandonment being complete, the jurisdiction of the Court is only limited to impose conditions as provided under Order XXIII and not to compel the plaintiffs to further continue their Suit.

On the other hand, the judgment that has been relied upon by the learned counsel for the petitioners-plaintiffs clearly carve out an exception to this abandonment under Order XXIII, Rule 1. The judgments clearly rule that an application for withdrawal, which has been filed, can be withdrawn by invoking Section 151 of C.P.C. It is settled that the provisions of Section 151 can be pressed into service where there is no provision under the Civil Procedure Code. The provisions for withdrawing a Suit unconditionally namely through abandonment is provided under Order XXIII, Rule 1. There is no provision for allowing an application to be filed for withdrawing such a withdrawal application. The question is, has the Legislature intended to prohibit the filing of such an application, and if the answer is in the positive, then the next question is whether the inherent powers u/s 151, C.P.C. can be invoked by the Court to allow such an application to be entertained. This is necessary as the consequences of abandonment are serious as they put a seal on all future claims. The question is if a person''s intention is the regulating factor, then so long as the Suit is not consigned, cannot the litigant be permitted to alter his unilateral intent before a formal order of the court intervenes. The power of the Court to prohibit at this stage can come into play which also can include the power to withdraw the earlier renunciation. The question of a bilateral overt act may not arise in a case of unilateral abandonment but the court''s order should intervene for recording the event as it arises in a pending proceeding. Abandonment undoubtedly is an unilateral act but here it is an act before the court. Whether it is genuine or not

founded on any misrepresentation or fraud may have to be ascertained, as in the case of compromise between the parties. There can be cases where an application is filed by an imposter or even by the counsel without instruction from his client. A proper verification and a formal order will obviate any such misgiving.

After the aforesaid arguments were advanced the court has come across another judgment in the case of M/s. Auto Oil Company and Another Vs. Indian Oil Corporation Ltd. and Others, which takes notice of the observations made by the Special Bench of three Hon''ble Judges in the Ram Janm Bhumi case, 2010 ADJ 1 (SFB.). The learned single Judge has noted paragraphs 1035 to 1036 of the said judgment and has then also noted the judgment in the case of Rajendra Prasad Gupta (supra) by the Apex Court to conclude that the mere presentation of an application will not culminate in an automatic withdrawal of a suit unless the court proceeds to pass orders as envisaged under law. Consequently, it has been acknowledged that if a prayer is made for not pressing the application for withdrawal the same cannot be ignored. Here again the observations made by the Apex Court in the case of K.S. Bhoopathy (supra) do not appear to have been noticed.

Learned counsel for the parties may inform the court as to whether the judgment in the case of K.S. Bhoopathy (supra) has been considered by the Full Bench in the Ram Janam Bhumi case or not.

The aforesaid questions having arisen on account of the divergent views expressed in the two Apex Court''s decisions noted above, it would be appropriate that the matter is resolved by a larger Bench for an authoritative pronouncement on the issue so raised by the learned counsel for the parties, who pray that the matter be heard again on Monday.

Since the matter is being heard in the background above, it would be appropriate that all further proceedings before the court below may remain stayed. Accordingly, until further orders of the Court, all further proceedings shall remain stayed.

The parties are further directed neither to alienate nor change the property in dispute during the pendency of the writ petition. Put up on Monday.

10. Learned counsel for the parties thereafter have proceeded to advance their submissions by placing reliance on the decisions aforesaid as also other decisions that have been dealt with hereinafter.

11. Sri Tripathi, learned counsel for the plaintiffs petitioners submits that the right of the plaintiff to withdraw from a Suit also includes a right inherent to revoke such an intention, so long as the Court has not passed any orders and the matter is pending. He contends that such an application can be filed u/s 151, C.P.C. for which heavy reliance has been placed on all the decisions cited by him including the decision in the case of Rajendra Prasad Gupta (supra) and the Special Full Bench decision in the

case of Sunni Central Board v. Sri Gopal Singh Visharad, 2010 ADJ I. He has further invited the attention of the Court to the decision of a learned single Judge, which has followed the aforesaid decisions in the case of M/s. Auto Oil Company, Majhola, Moradabad and another v. Indian Oil Corporation Ltd., 2011 (5) ADJ 800.

12. Sri Tripathi contends that the provisions of Order XXIII, Rule 1 for abandoning the claim unilaterally is hedged with limitations as prescribed in Order XXIII, Rule 1, sub-rule (4). He, therefore, contends that the Court has to pass an order formally regarding this withdrawal and so long as such an order is not passed, the plaintiff has a right to revoke his intention to withdraw the Suit. He therefore, submits that in the present case also the plaintiffs have moved an application on 15.3.2010, being Application No. 32C-2, followed by the endorsement of "not pressed" on 3.8.2011 on the withdrawal application which ought to have been taken into account by the courts below. Having not done so, a gross error has been committed resulting in manifest injustice and prejudice to the plaintiff. He submits that the substantial rights of the plaintiff in relation to the property in dispute after the death of their brother Kamta Prasad, was involved and, therefore, they had filed a Suit against the defendant, who was trying to usurp the property on the basis of a manipulated entry in the revenue records.

13. The defendant had compromised the matter and had agreed to surrender her rights in favour of the petitioners but later on, her intention had altered and on coming to know of the aforesaid facts, the plaintiffs-petitioners immediately responded by revoking their request to withdraw the Suit. Sri Tripathi submits that it was the defendant, who has resiled from the compromise and intended to defraud the petitioner that gave rise to the filing of the application by the plaintiffs expressing their clear intention to revoke the withdrawal application.

14. Sri Tripathi urges that the very right as recognized under Order XXIII to abandon a claim also recognises the right to withdraw such an abandonment up to the stage of passing of any orders by the Court in this respect. The contention also is that the power of the court should be preserved to the extent of passing of an order and abandonment should not be treated to be an accomplished act culminating in on a mere moving of an application. The reason explained by Sri Tripathi is that there can be cases where an application is fraudulently moved or misrepresented or even a case where a lawyer without instructions proceeds to withdraw the Suit. There can be also cases where a request for withdrawal is made under a mistaken belief and in such circumstances, the litigant has a right to rectify the error or in the case of fraud and misrepresentation has a right to get the application rejected for which powers of the Court are preserved u/s 151. C.P.C.

15. It is only after an order is passed by the Court, that such a change of intention may not be permissible so long as the Court does not pass an order after investigating the aforesaid facts. The mere moving of an application for withdrawal should not in all contingencies be accepted to be an expression of abandonment.

16. He contends that in the case of K.S. Bhoopathy (supra), the right to withdraw was at the stage of appeal and any observation made in the said judgment, does not lay down a contrary law to what has been said by the Apex Court in the case of Rajendra Prasad Gupta (supra). In the Full Bench decision of Sunni Central Board (supra), the law has been clearly expounded and the discretionary power of the civil court u/s 151 can be invoked to permit withdrawal of the abandonment application as there is no provision prohibiting the moving of such an application under the Civil Procedure Code. The submission, therefore, is that the courts below have wrongly allowed the application for withdrawal and have permitted the withdrawal of the Suit unconditionally in the background of the case, whereas the courts below ought to have allowed the plaintiff to pursue the Suit in view of their application dated 15.3.2010 and their endorsement dated 3.8.2011. The procedure adopted by the courts below is, therefore contrary to law and the same deserves to be set aside.

17. Replying to the aforesaid submissions. Sri Amit Manohar contends that once an application is moved by a plaintiff to withdraw the Suit, the intention Is complete and nothing remains to be done by the court below so far as the intention to withdraw from the proceedings is concerned. The only limited jurisdiction left with the Court is that which is contained in sub-rule (4) of Order XXIII, Rule 1 namely to impose costs etc. but the Court cannot compel the plaintiff to continue the Suit. He submits that once an intention to abandon the claim has been expressed, the same amounts to withdrawal from the lis. Once the lis is terminated voluntarily by the plaintiff, then the plaintiff has no right left to be exercised for further altering the said abandonment.

18. Coming to the decisions that have been cited at the Bar he submits that the ratio of the decisions that lay down that withdrawal is complete on moving of an application is a correct position of law keeping in view the amendment brought about in the CPC w.e.f. 1.2.1977 In Order XXIII. According to him, the word "abandonment" is the absolute surrender of a litigation which is the right of a litigant to do so. Once the said right has been exercised, the litigation terminates as against the person expressing his intention to withdraw from the litigation. According to Sri Amit Manohar sub-rule (3) restricts the jurisdiction of the Court only to the extent of imposing conditions and the Court Is functus officio in relation to the adjudication of the case on merits. This is because the plaintiff has already withdrawn from the litigation and therefore, there remains nothing to be decided. For this, a permission of the Court is not necessary and no order is required for such withdrawal which is unilateral.

19. He has invited the attention of the Court to similar provisions under Order XXI, Rule 89(2) to contend that where the word withdrawal has been used, the order of the Court is not necessary and the withdrawal is complete which extinguishes the right of the plaintiff to further continue the Suit. He has further relied on the decision in the case of Shipping Corporation of India Ltd. Vs. Machado Brothers and

Others, to contend that where the Statute is clearly prescribed and covers the field, then Section 151 of the CPC cannot be pressed into service. Reliance is placed on para 20 of the said decision to urge that such a course is impermissible, which can be supplemented by the proposition that if a procedure is prescribed in the Statute, then it has to be done in that manner alone and not otherwise.

20. Coming to the decisions cited on behalf of the petitioner''s counsel, Sri Amit Manohar submits that the decision in the case Rajendra Prasad Gupta (supra) does not notice the earlier decision in the case of K.S. Bhoopathy (supra) and, therefore, cannot be said to laying down the law correctly. The relevant paragraph of the Special Full Bench in the case of Sunni Central Board (supra) have been read extensively by Sri Amit Manohar to urge that they are obiter as there was no such issue involved and is, therefore, not stare decisis. To substantiate his argument, he relies on the case of Union of India (UOI) and Others Vs. S.K. Kapoor, ; M.P. Rural Road Development Authority and Another Vs. L.G. Chaudhary Engineers and Cont., and the decision in the case of Rattiram and Others Vs. State of M.P.,

21. The contention, therefore, is that the plaintiff once having abandoned his claim he cannot give a second thought to his intention of withdrawal from the proceedings and his claim would stand terminated automatically on the moving of an application for withdrawal. He, therefore, submits that in view of the gamut of facts of this case, the judgment in the case of Sunni Central Board (supra) which overrules the decision in the case of Smt. Raisa Sultana Begam (supra) is not a binding precedent and cannot be pressed into service in the aforesaid background. He has further invited the other decisions that have been noted in the order dated 21.11.2012 and the other judgments referred to hereinabove.

22. Having heard learned counsel for the parties, it would be appropriate to delve into the Legislative intent of Order XXIII, Rule 1 of the CPC that is extracted hereunder for ready reference: -

ORDER XXIII
WITHDRAWAL AND ADJUSTMENT OF SUITS

(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:

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.

(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.

(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, 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.

(4) Where the plaintiff -

(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), 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.

(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.]

23. This provision was amended with the word "abandon" appearing in the Section which was previously a little different from the present context. To abandon means to relinquish or give up one''s claim. It is a sort of renunciation and unless taken to be otherwise, a voluntary resignation or disowning of a claim. It is at times in the interest of another and it seeks to repudiate one''s rights. A person casts off his vow to continue doing something and is a formal declaration thereof. The person abandoning a claim is voluntarily surrendering or sacrificing his claim. It is a disclaimer or forsaking of a right. The action taken is sought to be retracted from and is, therefore, an absolute unconditional withdrawal of one''s right to pursue any further claim.

24. The provision of Order XXIII is, however, hedged with limitations on this right of absolute withdrawal even where it is unilateral and voluntary. The Court retains the powers of imposing costs on terms and conditions even where the withdrawal is unconditional. The other side of the Coin is that there can be cases where such abandonment is a result of threat, coercion fraud and misrepresentation. In short, it is not voluntary or unilateral and, therefore, it cannot be said to be an absolute withdrawal. There can be a contingency where such expression of withdrawal can be alleged to be not in a sound state of mind or even under a mistaken belief or wrong advice. It is in such contingencies that the inherent power of the Court u/s 151, C.P.C. has to be adverted to in order to rectify any mischief or fraud or even

correction of legally permissible mistakes. Thus the right of a litigant may be absolute for withdrawing from a litigation but it is hedged with the aforesaid limitation and, therefore, can be said to be subject to any orders passed or adjudication before the withdrawal is treated to be absolute. The intention therefore, expressed to withdraw from a Suit may require the passing of an order of the Court before finality is attached to the same.

25. The public policy behind the aforesaid provision is to bring litigation to an end and also not to allow the courts to compel a litigant to fight his case. If a litigant does not choose to contest, the Court cannot prolong litigation by compelling a person to wait for a formal adjudication. It is in the aforesaid context that the word abandonment, as used in Order XXIII, has to be understood.

26. The judgments, which have been relied upon by the learned counsel for the petitioners-plaintiffs, preserve a right in favour of the litigant to revoke the intention of withdrawal by inviting the Court to exercise powers u/s 151, C.P.C. The decision in the case of Rajendra Prasad Gupta (supra) clearly supports this proposition and the judgment of the Full Bench in the case of Sunni Central Board (supra) coupled with the decision in the case of M/s. Auto Oil Company (supra) also affirms the same. The judgment of Sunni Central Board (supra) also specifically overrules the view of the Allahabad High Court in the case of Raisa Sultana Begam (supra) and holds that it does not lay down the law correctly. It is, however, to be kept in mind that the judgment in the case of Sunni Central Board is under serious challenge that is pending scrutiny before the Apex Court. The Apex Court has stayed the operation of the judgment and decree passed by the Full Bench vide its order dated 9.5.2011 passed in Civil Appeal No. 10866-10867 of 2010. The extract whereof, which is relevant for the present controversy, is quoted hereunder:

During the pendency of the appeals, the operation of the judgment and decree passed by the Allahabad High Court shall remain stayed.

27. This Court is however proceeding to consider the matter keeping in view the law laid down by the Apex Court in the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, as the stay order does not wipe out the judgment from existence. It only keeps it in abeyance.

28. As against this the reliance placed by the learned counsel for the respondent-defendant is substantially based on the judgment in the case of K.S. Bhoopathy (supra) and the case of the Supreme Court in Hulas Rai Baijnath (supra). The decision in the case of K.S. Bhoopathy (supra) proceeds to explain the law in paragraph No. 12 which is in relation to sub-rule (3) of Rule 1 of Order XXIII. This, therefore, is a decision where permission was sought to file a fresh Suit. The aforesaid decision was not directly a case of an outright withdrawal of a Suit before the trial commenced. In the aforesaid circumstances, the observations made in K.S. Bhoopathy (supra) about abandonment is in relation to where permission is sought

to file a fresh Suit. The ratio, therefore, of the said decision is not attracted on the facts of the present case and is not a law which may go contrary to what has been said in the decision relied upon by the learned counsel for the petitioners-plaintiffs.

29. However, the decision in the case of Hulas Rai Baijnath (supra) in paragraph No. 2 clearly lays down that the Court does not have a power to refuse to the plaintiff his right to withdraw the Suit and is bound to do so. That was also a case where the plaintiff wanted to withdraw from the Suit and was not a case where he was revoking his right to withdraw from the Suit. The defendant was resisting the withdrawal on which the Court ruled that the plaintiffs have an unqualified right to withdraw the Suit as no vested right had accrued to the defendant. The aforesaid decision also, therefore, does not come to the aid of the learned counsel for the respondents.

30. The contention raised that Order XXI, Rule 89(II) has similar wordings and the order of the Court is not necessary, is not attracted, as the ingredients of Order XXIII are entirely different as discussed hereinabove. A litigant can surrender his right to contest a matter which is the essence of Order XXIII. The right to withdraw such an intention of surrender or revoke the same which can arise in the circumstances as discussed hereinabove is a different issue. These ingredients, therefore, in relation to the entire disclaimer of the claim is not comparable with the provisions of Order XXI, Rule 89(2) in a matter arising out of execution.

31. There is yet another aspect which requires consideration namely the consequences of such withdrawal which are unilateral and voluntarily. A litigant is precluded for all times to come from raising any similar issue or claiming any similar right. The consequences are, therefore, so absolute that before any opinion is expressed thereon, the legal right to waive a claim has to be assessed. It is true that a litigant has a right and an unqualified right to withdraw from a litigation but it is subject to certain conditions. The right to contest or seek a judicial remedy partakes the nature of the basic structure of the Constitution. It is controlled by law made by the Parliament and the right to seek a judicial remedy, therefore, cannot be denied to a litigant. Similarly the remedy already sought can be abandoned which is also permitted by law. In my opinion, before an order is passed by a court formally terminating the litigation, this right to revoke a withdrawal can also be exercised and to this extent, the power of the Court is preserved in order to do complete justice between the parties. The reason is that a voluntary termination of a litigation has drastic consequences. It is severing one''s hands for all times to come. To avoid any injustice, the right of a litigant to change the intent should be saved to conserve any possible lawful claim, till an order terminating the litigation is formally passed by the court. This would in no way prejudice any right of the defendant, and the damage if any, can be rectified by the court while passing the formal order. The procedure, therefore, would enure to the benefit of both parties. The Court should, however, at the very outset if such an application is filed, proceed to decide the

same so that it does not leave the parties in a state of indecisiveness. This would also help in terminating unnecessary litigation.

32. Apart from this, a compromise sought to be enforced has to be verified by the parties and their counsel, duly signed and supported by an affidavit. Similarly, an application for withdrawal/ abandonment should also be duly verified as bona fide and for that the court is required to apply its mind and pass an order. If an application u/s 151, C.P.C. is filed to withdraw the application before any order is passed, the court in a similar fashion has to apply its mind and pass orders. The right to withdraw from a case is no doubt absolute, but this exercise of right does not terminate the duty of the court to pass an order. Even if the litigant has chosen to abandon his claim it requires to be recorded by the Court to formally close the proceedings. If that is so, then the inherent power of the court does not prevent it from entertaining an application to revoke the withdrawal application. The abandonment would be complete, being an unilateral voluntary act. subject to orders to be passed by the court if an application is filed to permit revocation. If the argument that no permission is required for unconditional withdrawal is accepted, then there cannot be a prohibition or even requirement of a permission to move an application to withdraw the abandonment before orders are formally passed by the court terminating the proceedings.
The authority of the court is retained to that extent so long as the proceedings are not formally consigned.

33. In the instant case, the application for withdrawal was immediately followed by an application to revoke the said withdrawal but the Court went on to frame issues and also allowed the parties to lead evidence without passing any orders on the withdrawal application. Thus, the parties were aware that the plaintiffs do not wish to withdraw from the litigation and the Court had proceeded accordingly. It appears that after almost one and a half year, the endorsement of "not pressed" was also made and without traversing the aforesaid facts, the trial court terminated the Suit permitting its withdrawal. The revisional court even though noticed the facts aforesaid yet upheld the order of the trial court on the basis of the Division Bench judgment in the case of Raisa Sultana Begam (supra) which already stands overruled by the Full Bench in the case of Sunni Central Board (supra) that does not appear to have been brought to its notice. The revisional court did not give any reason for not following the Apex Court decision in the case of Rajendra Prasad Gupta (supra).

34. It is at this stage that the argument of the learned counsel for the respondent branding the Full Bench decision in the case of Sunni Central Board (supra) as obiter has to be dealt with.

35. Learned counsel for the respondent is right in relying on the decision in the case of Arun Kumar Aggarwal Vs. State of Madhya Pradesh and Others, to explain the distinction between dicta and obiter dicta. There cannot be any dispute with the

aforesaid proposition of law. Sri Amit Manohar invited the attention of the Court to paragraph 1043 of Sunni Central Board case to contend that the Full Bench was nowhere concerned with any such proposition and to understand the said argument, paragraph 1043 of the decision in the case of Sunni Central Board (supra) is quoted herein under:

1043. We may also observe here at that so far as the present case is concerned, no application under Order XXIII. Rule 1 has been filed by the plaintiff (Suit-5) seeking withdrawal of the Suit and instead the alleged application is with reference to Section 4 (3) of Act 33 of 1993. Therefore, Order XXIII, Rule 1 even otherwise would not be attracted in the present case.

36. Sri Amit Manohar contends that in the aforesaid famous case of Ram Janam Bhumi, the essence of the dispute was in relation to the provision of Section 4 (3) of the Acquisition Act No. 33 of 1993 that was concerned with estoppel, acquiescence and abatement of the Suit. There was no occasion for any pronouncement on any issue of Order XXIII, Rule 1 which was neither raised nor was required to be decided and, therefore, Sri Manohar contends that the Full Bench decision is obiter. He urges that doctrine of stare decisis is not attracted. The said decision is, therefore, not a binding precedent which has been incorrectly followed by the learned single Judge in the case of M/s. Auto Oil Company (supra).

37. Having considered the same, this Court does not find the Full Bench decision to be obiter in the sense that it has specifically overruled the case of Smt. Raisa Sultana Begam (supra). The revisional court does not appear to be aware of the aforesaid Full Bench decision and has very casually relied on the decision of Smt. Raisa without giving any reason for not. following the Supreme Court decision in the case of Rajendra Prasad Gupta (supra). To say that the judgment is obiter would not be correct inasmuch as it would be appropriate to refer to paragraphs 1025 to 1035 of the decision in the case of Sunni Central Board (supra) that has considered all the judgments for the purpose of laying down the law on Order XXIII, Rule 1. It is, therefore, not a passing reference and the decision has been taken in the context of the plaintiffs having abandoned their rights to the land in dispute. Applying the principles in the case of Arun Kumar Agrawal (supra), this Court does not find the Full Bench decision to be obiter as it is a judicial pronouncement on a point that was taken and considered by the said Full Bench.

38. Coming to the facts of the present case and applying the aforesaid principles, the Court finds that the application was moved for withdrawing the Suit on the basis of an alleged compromise between the parties. Thus, it was an application for permitting the Suit to be withdrawn on the said premise. The plaintiff alleges that the defendant intended to resile back from the compromise which led to the filing of the application on 15.3.2010, being Application No. 32C-2, for revoking the intention of withdrawal, followed by the endorsement of "not pressed" on the withdrawal application dated 3.8.2011. This action of the plaintiffs was, therefore, clearly

intended to preserve the rights to contest the Suit which had also been expressed In the withdrawal application where the plaintiff had imposed a condition that the Suit was sought to be withdrawn without prejudice to his rights. The intention even though unilateral or voluntary was, therefore, conditional as it prima facie appears from a perusal of the aforesaid facts as brought on record. The trial court failed to discuss the same and the revisional court, even though had noticed it, has not recorded any finding keeping in view the law laid down in the case of Rajendra Prasad Gupta (supra). Thus, the revisional court also committed a manifest error by placing reliance on the judgment in the case'' of Raisa Sultana Begam (supra) which already stood overruled by the Full Bench in the case of Sunni Central Board (supra). In the aforesaid context and keeping in view the reasons recorded hereinabove, the orders of the trial court and that of the revisional court cannot be sustained. The orders dated 18.8.2012 and 28.9.2012 passed by the courts below are hereby set aside. The writ petition is allowed. The trial court is now directed to first proceed to apply its mind to the application No. 30A-1 coupled with the application No. 32C-2 simultaneously alongwith the other affidavits and objections in relation thereto on record and then proceed to pass an order in the light of the observations made hereinabove after giving full opportunity to the contesting parties within 3 months from the date of production of a certified copy of this order before him.