

(2004) 02 AHC CK 0061

Allahabad High Court

Case No: F.A.F.O. No. 2103 of 2003

Prakash Chandra Mishra and
Another

APPELLANT

Vs

Rajendra Prasad Gupta and
Others

RESPONDENT

Date of Decision: Feb. 6, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1

Citation: (2004) 2 AWC 1673 : (2005) 2 RCR(Civil) 501 : (2004) 97 RD 137

Hon'ble Judges: Prakash Krishna, J

Bench: Single Bench

Advocate: Arvind Kumar Shukla, for the Appellant; B.N. Tiwari, for the Respondent

Final Decision: Allowed

Judgement

This Judgment has been overruled by : [Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and Others](#), AIR 2011 SC 1137 : (2011) 112 CLT 66 : (2011) 2 CTC 463 : (2011) 1 RCR(Civil) 801 : (2011) 1 SCALE 469 : (2011) 1 SCR 321 : (2011) AIRSCW 1318

Prakash Krishna, J.

This is defendant's appeal. It arises out of a Suit No. 1301 of 1997 filed by the plaintiff respondents in the Court of Civil Judge (Junior Division) for permanent injunction restraining the defendants directing them not to interfere in the plaintiffs' exclusive right of use and passage over the land described by letters and shown by red colour in the plaint map. It appears that the plaintiffs respondents filed an application for temporary injunction, which was granted by the trial court. On 12.12.1997 the plaintiffs respondents moved an application for withdrawal of the

suit. A true copy of the said application has been annexed as Annexure-1 to the affidavit and is on Page 33 of the paper book. It has been stated therein that the plaintiffs presently want to withdraw the suit and that none of the defendants have appeared. In the relief clause the prayer for withdrawal of the suit was made. The Court fixed 7.1.1998 as it was the date fixed for appearance of the defendants in the suit and also for disposal of temporary injunction application. On that date no objection was filed by the defendants. Before the order could be passed by the Court on the application to withdraw the suit, another application was filed by the plaintiffs respondents for withdrawing the application of withdrawal of the suit.

2. The trial court was of the opinion that the application for withdrawal of the suit was under Order XXIII, Rule 1 of the Code of Civil Procedure. No specific order for withdrawal of the suit was required. Therefore, for all practical purposes the suit stands withdrawn. In that view of the matter the application to withdraw the application for withdrawal of the suit is not maintainable. Reliance was placed upon a Division Bench judgment of this Court. By order dated 18.9.1998 application No. 14-Ka was rejected and the suit was treated to have been dismissed. This order has been set aside by the Court below in Civil Appeal No. 262 of 1998 by its judgment and order dated 5.5.2003. The matter has been remanded to the Court below for disposal of the dispute on merit. Aggrieved by this order the defendants have come up before this Court in present appeal.

3. Heard learned counsel for the parties and perused the record.

4. A Division Bench of this Court in the case of [Smt. Raisa Sultana Begam and Others Vs. Abdul Qadir and Others](#), has considered similar controversy. It has been held that the plaintiffs who have already moved application for withdrawal of the suit cannot withdraw the application for withdrawal of the suit. The withdrawal of suit is a unilateral act to be done by the plaintiffs. It requires no permission or order of the Court and is not subject to any condition. It becomes effective as soon as it is done just a compromise does.

5. Learned counsel for the respondents has sought to distinguish this ruling which is otherwise wholly applicable to the facts of the present case on two grounds. Firstly the provisions of Order XXIII. Rule 1, C.P.C. have been drastically amended by the amending Act of 1976. Under the amended provisions in place of the word "withdrawal" the word "abandonment" has been used. Reliance was placed by him upon a subsequent judgment of this Court given in the case of Upendra Kumar and Ors. v. District Judge and Ors. 1997 (2) AWC 1301. Secondly. the withdrawal of suit was a conditional one inasmuch as in the said application the words "Maujuda Samay" were used to signify that presently the plaintiffs do not want to pursue the suit. Elaborating his argument, according to him it was a conditional withdrawal and, as such, unless and until permission is granted by the Court there is no withdrawal of the suit and, as such, application to withdraw the suit is maintainable.

6. At this stage it is relevant to refer the Order XXIII, Rule 1, C.P.C., which runs as follows :

"Rule 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 (i), 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 plaintiff."

Interpreting the aforesaid provision a learned single Judge in the case of Upendra Kumar (supra), has come to the conclusion that under the old Rules there were two kind of withdrawals namely (i) absolute withdrawal, and (ii) withdrawal with permission of the Court. The use of the word "withdrawal" in relation to both kinds of withdrawal was a source of confusion. The rule was suitably amended in the year 1976 to avoid such confusion by use of word "abandonment" in place of the word "withdrawal" in relation to first kind of withdrawal mentioned in the old Sub-rule (1).

Sub-rule (1) deals with the absolute withdrawal. It has been further held in para 7 of the aforesaid ruling that the rule does not require any order in the case of withdrawal (abandonment) without permission. It does not require drawing of a decree. The action of abandonment is complete with the filing of application. Once abandoned the same cannot be withdrawn since it would have the effect of revival of the suit itself. The ultimate conclusion has been recorded in para 12 of the said judgment, which is quoted below :

"12. Then again the withdrawal or abandonment without leave being a unilateral act of the plaintiff the defendant cannot enforce such unilateral act. It is only for the Court to examine whether such act is an abandonment and has been exercised unilaterally when the same is sought to be recalled or withdrawn. If it is unilateral act of abandonment it is complete as soon made without depending on any order being made thereon by the Court or its acting upon the same and attracting the consequence of Sub-rule (4) of Rule 1, Order XXIII of the Code."

7. In view of the above ruling it is clear that the present one is the case of abandonment of the suit and it was complete as soon as application was filed. There is no allegation of any fraud or collusion etc. In this view of the matter order of the Court below cannot be sustained. Thus, the first point raised by the respondent has no merit.

8. The second point that withdrawal was conditional one has also got no merit. The word "Maujuda Samay" places no condition. It simply means that presently the plaintiffs do not want to pursue the suit and they want to withdraw it.

9. In view of the above the order of the Court below is liable to be set aside. The appeal is allowed. The order dated 5th May, 2003 is set aside and the order of the trial court is restored. There shall be however, no order as to costs.