(1998) RD 522

Allahabad High Court

Case No: C.M.W.P. No. 6199 of 1997

Upendra Kumar and Others		APPELLANT
	Vs	
District Judge and Others		RESPONDENT

Date of Decision: March 18, 1997

Acts Referred:
Civil Procedure Code, 1908 (CPC) â€" Order 23 Rule 1, Order 32 Rule 1, Order 32 Rule 1(1), Order 32 Rule 1(2), Order 32 Rule 1(3)

Citation: (1998) RD 522

Hon'ble Judges: D.K. Seth, J

Bench: Single Bench

Advocate: Prakash Padia, for the Appellant; Rajendra Rai and S.C., for the Respondent

Final Decision: Dismissed

Judgement

D.K. Seth, J.
In a suit for declaration and/or cancellation of the deed of sale the Plaintiffs filed an application on 15.11.1988, which is

Annexure 3 to the writ petition. Before any order could be passed on the said application, the Plaintiffs filed another application on 29.11.1988,

which is Annexure-4 to the writ petition, for dismissal of the said application as contained in Annexure 3 to the writ petition. The Defendants had

filed his objection to the said application contained in Annexure 4 to the writ petition. On 5.12.1996 the said application, contained in Annexure 3

to the writ petition was dismissed, while allowing application contained in Annexure 4 to the writ petition. A revision was filed against the order

dated 5.12.1996. By an order dated 29.1.1997 the said revision was also dismissed. It is this order which has since been challenged by means of

this writ petition.

2. Dr. R. G. Padia, learned counsel for the Petitioners contends that the application as contained in Annexure 3 to the writ petition, being an

application under Order XXIII, Rule 1 of the Code of Civil Procedure, the same become absolute as soon it was filed. Therefore, the same cannot

be withdrawn or cancelled by means of any subsequent application. Inasmuch as withdrawal of the suit is unilateral act which become absolute as

soon the same is filed before the court. Since no leave was asked for, therefore, it was not necessary that any order is to be passed by the court on

the said application. In support of his contention he relies on the decision in the case of Smt. Raisa Sultana Begam and Others Vs. Abdul Qadir

and Others, and contends that a Division Bench of this Court had held that withdrawing of a suit is unilateral act of the Plaintiff, it requires no

permission or order of the court and is not subject to any condition and it becomes effective as soon as it is done. Therefore, dismissal of the said

application as contained in Annexure 3 to the writ petition by reason of allowing the application contained in Annexure 4 to the writ petition is

wholly contrary to law and is wholly without Jurisdiction and perverse. Secondly, he contends that in the application contained in Annexure 3 to the

writ petition, no consideration has been mentioned, whereas in the application contained in Annexure 4 to the writ petition it is suggested that some

consideration was proposed, but the same did not pass on to the Plaintiff. In order to dispute the said suggestion the Defendants sought to examine

the learned counsel of the Plaintiff on the ground that the amount of consideration was paid to the counsel who had signed the application,

contained in Annexure 3 to the writ petition. In order to stress on the genuineness he had drawn my attention to Annexure 3, which is said to have

been signed not only by the counsel for the Plaintiffs but also by both the Defendants and the Plaintiff, while the Plaintiff had put in her left thumb

Impression. But the application for examination of the learned counsel for the Plaintiffs was rejected by the learned trial court, which is illegal and

irregular exercise jurisdiction, resulting in grave injustice culminated in the order passed by the learned trial court. His similar application made

before the revisional court also stood dismissed, which again is illegal and irregular exercise of Jurisdiction by the revisional court. On that ground

as well the order impugned in the writ petition cannot be sustained.

3. Sri Rajendra Rai, learned counsel appearing on behalf of Respondents, on the other hand, contends that the ratio decided in the case of Smt.

Raisa Sultana (supra) referred to by Dr. Padia, is not applicable, in the facts and circumstances of the present case. According to him the present

facts and circumstances of the case are clearly distinguishable from the facts involved in the said case on the basis of which the ratio decided

therein was laid down. He led me through the contents of Annexures 3 and 4 to the writ petition in order to substantiate his contention.

4. I have heard Dr. R. G. Padia appearing with Mr. Prakash Padia, for the Petitioners and Sri Rajendra Rai, learned counsel appearing on behalf

of Respondents at some length. In order to appreciate the respective contentions it is necessary to examine the scope of Order XXIII, Rule 1 of

the Code of Civil Procedure, 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 (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.

5. Prior to 1976 amendment of the Code instead of the word "abandon" now used in the present rule, the word withdraw" was used. Under the

old rule there were two kinds of withdrawis namely, (1) absolute withdrawal and (2) withdrawal with the permission of the court. As the use of the

word "withdrawal" in relation to both kinds of withdrawals caused confusion, the rule is amended to avoid such confusion by the use of the word

abandon"" in place of the word ""withdrawal"" in relation to the first kind of withdrawal mentioned in old Sub-rule (1) namely absolute withdrawal".

In relation to second kind of withdrawal mentioned in old Sub-rule (2) namely withdrawal with the permission of the court, the word ""withdrawal

is used in the substituted Rule 1. This clear distinction is maintained throughout in the substituted rule. By reason of sab-rule (3) which correspond

to old Sub-rule (2). The second kind of withdrawal with leave to sue afresh, is required to be made with the permission of the Court.

6. Admittedly the right to abandon is a right reserved to the Plaintiffs and can be exercised unilaterally by the Plaintiff himself without permission of

the court. Such abandonment precludes filing of fresh suit on the same cause of action unless he obtains leave under sub- rule (3) as is provided in

Sub-rule (4). It is so held in the case of Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co., In R. Ramamurthi Iyer Vs. Raja V. Rajeswara Rao, , it

is laid down that where vested interest comes into existence before the prayer for withdrawal (now abandonment) is made court is not bound to

allow withdrawal (now abandonment). But this can happen in only very limited circumstances, i.e., where a preliminary decree had been passed, a

set off or counter claim had been claimed or in a partition suit after the Defendant has gained the advantage of buying the share of the Plaintiff etc.

7. The rule does not require any order in the case of withdrawal (abandonment) without permission. It does not require drawing up of any decree,

but the order may be formally drawn up if the court directs payment of cost to the Defendant, is the view taken in Saraswati Bala Samanta and

Others Vs. Surabala Dassi and Others, . The High Court of Madras recognised Courts power in appropriate case to allow withdrawal of the

application to withdraw in Lakshmana Pillai v. Appalwar Alway Ayyamgar AIR 1923 Mad 246 . In Rameswar Sarkar Vs. State of West Bengal

and Others, same view was taken by the Calcutta High Court that under inherent power it can do so in appropriate case. The Bombay High Court

in Yeshwant Govardhan Vs. Totaram Avasu and Others, , expressed the view that it is open to the Plaintiff to withdraw his application if no

effective order has been passed by the Court. Orissa High Court in Prema Chanda Barik Vs. Prafulla Kumar Mohanty, took the view that the

applicant can withdraw his application before the Court acts on it. But the Allahabad High Court in Raisa Sultana (supra) has taken a contrary

view disagreeing with the view taken by the High Courts of Calcutta, Bombay and Madras particularly in the case of Yashwant Govardhan

(supra), Lakshmana Pillai (supra) and distinguished the case of Midnapore Zemindary Co. Ltd. Vs. Raja Bijoy Singh Dudhuria and Others, The

reason of Its dissent from the various decisions referred to in the said judgment is summarised in paragraphs 9 and 10 thereof. The said decision by

the bench Is binding on this Court.

8. Admittedly, the present case does not come within the exceptions referred to in the case of R. Rammurthi (supra) since such abandonment does

not require any permission of the court therefore, by simple analogy unilateral act of the Plaintiffs in the manner of filing the application intimating the

court of abandonment become absolute as soon such an application is filed. The action of abandonment is complete with the filing of the

application. Once abandoned the same cannot be withdrawn since it would have the effect of revival of the suit itself namely in other words it

would be operative against Sub-rule (4) prohibiting institution of fresh suit. In asmuchas the moment it is abandoned it comes to a dead end. After

the abandonment if he seeks to recall abandonment it would be an act of the institution of fresh suit. The principle laid down in the case of Raisa

Sultana (supra) does not seem to be of any lesser effect because of the changes brought about in Sub-rule (1) by insertion of the word ''abandon''

in place of withdrawal. On the other hand the said principle would apply with greater force in such a case. it is no more withdrawal of a suit but is

an abandonment of the right. The word ''abandon'' means to relinquished surrender or give up ones claim or interest. Once relinquished the

abandonment is complete. The act of abandonment is a volition. It is not dependent on another''s will. It is a right or liberty that is exercised. The

exercise is complete as soon formally expressed by means of an application. If after exercise of the act of relinquishment is sought to be withdrawn,

it would be picking up of the abandoned cause after the period during which it remains abandoned or relinquished. There is no scope of survival of

abandonment or relinquishment after the act of abandonment is exercised. It is an act like shooting an arrow. Once shot it cannot be retraced or

recalled. The shooting is complete as soon it leaves the bow and out of the control of the shooter. The period of abandonment or relinquishment is

a blank which can never be filled up, a void which can never be bridged, a gap which can never be linked or connected. It cannot be said to be

continuation of the right in a dormant stage. It is a cessation of right. As laid down in para 8 in the case of Raisa Sultana (supra) such an act is like a

point and not continuous like a line. As soon as it is abandoned the suit becomes end and nothing remains pending and becomes subject to Sub-

rule (4) as soon the Plaintiff abandons a suit. The Plaintiff cannot revoke or withdraw the act of withdrawal or abandon the abandonment. If he is

barred from instituting fresh suit it means he is absolutely barred from reviving his status as the Plaintiff. The bar would be meaningless, if he is

permitted to revoke or abandon the abandonment and get himself restored to the status of the Plaintiff in respect of abandoned suit.

9. In the above context it is necessary to examine as to whether the application contained in Annexure 3 to the writ petition is abandonment within

the meaning of Sub-rule (1) of Rule 1 of Order XXIII. As translated at the bar the contents of the application is that the claim of the Plaintiffs have

been settled between the parties for which the Plaintiff does not want to proceed with the suit nor there is any necessity of the suit and in such

circumstances it is necessary to dismiss unnecessary suit without any judgment and if the suit is so dismissed the parties do not have any objection

nor there would be any in future. Therefore, the Plaintiff pray for dismissal of the suit without any judgment. The said application was signed by the

learned counsel for the Plaintiff and by the two Defendants while the Plaintiff had put in her left thumb impression. The signatures of the Defendants

on the said application does not leave the said application to be unilateral act. The very signature of the Defendants appended on the said

application indicates of some settlement between the parties. Then again the expression that the parties do not have any objection if the suit is

dismissed also indicates that there was some understanding with the Defendants as well. Furthermore the expression that the dispute has been

settled between the parties also indicates some understanding between the parties. Such a situation presupposes that the action of the Plaintiffs is

not a unilateral act. No where it is indicated that the claim is being abandoned on the other hand the claim having been settled, the suit ought to

have been dismissed without any judgment. At best the application could be construed to mean an application for dismissal of the suit for non-

prosecution. The dismissal of the suit for non-prosecution since the claim has been said to have been settled, can never mean abandonment of the

suit or claim on the other hand the claim having been settled the Plaintiffs do not want to proceed with the suit.

10. The word "non-prosecution" and "abandonment" are not synonims. There is a great difference between "abandonment" and "non-

prosecution". The new Shorter Oxford Dictionary meaning of "prosecution" is given as "following up, continuation, or pursuit of a course of action

etc. with a view to its completion. The institution and conducting of legal proceedings against a person or in pursuit of a claim. Thus "non-

prosecution" in a case settled between the parties means the pursuit of the claim is complete. It is not an abandonment of the claim. It is a

consequence of the settlement of the claim by reason whereof the pursuit is complete. It is an achievement of the claim, whatever might be the

manner.

11. The prayer or dismissal of the suit without judgment does not amount to abandonment of the suit or claim. The very existence of the statement

in Annexure 4 to the writ petition that consideration was not paid and the said application having been made without any consideration, indicates

that the application as contained in Annexur 3 to the writ petition, to be void one since the same was filed without any consideration. Inasmuch as

the application contained in Annexure 3 to the writ petition speaks of settlement whereas the application as contained in Annexure 4 to the writ

petition speaks that consideration for the settlement has not been passed on to the Plaintiff. Therefore the application contained in Annexure 3

being without consideration cannot be enforced by the Defendants. Even then it cannot be treated to be "abandonment" in the facts and

circumstances of the case which clearly distinguishes the present application from being an application for abandonment or a unilateral action of the

Plaintiffs.

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.

13. If the application is not an application within Sub-rule (1) of Rule 1 of Order XXIII of the Code in that event the ratio decided in Raisa Sultana

(supra) case cannot be : attracted and if Sub-rule (1) of Rule 1 is not attracted then Sub-rule (4) of Rule 1 cannot be attracted.

14. On these grounds the contention of the learned counsel for the Petitioner with regard to his first point, cannot succeed, in view of peculiar facts

and circumstances of the case which takes away the present case from the ratio sought to be applied by the Petitioner.

15. With regard to the second question raised by the learned counsel/or the Petitioner it is contended that substantial money has been passed over

for the alleged consideration for abandonment due to which the application. Annexure 3 was filed by the Plaintiff. Such payment was made to the

Plaintiffs through his learned counsel who had signed the said application. The application as contained in Annexure 3 does not indicate any such

payment though it suggests of settlement. The contents of Annexure 4 to the petition on the other hand indicates that such consideration for which

settlement was agreed by the Plaintiffs has not been received by her. In none of these applications quantum is specified. Whereas the Defendant

seeks to specify the quantum.

16. Be that as it may the said question is neither here nor there and is not germain to the issues involved. Whether the amount was paid or not is

not a question to be gone into in the present case, particularly, when the application was not an application for compromise and particularly when

there is no such case made out on the face of it. The Defendant is also not coming with the case that he is in possession of any receipts with regard

to payment of the said sum. Even then that is a question to be gone into on relevant evidence which may enable the Defendant to lodge counter

claim or incorporate a defence on the basis thereof and which they may prove in accordance with law if it can be proved under law. Such

questions need not be gone into at this stage which will remain open to the parties, if it is available and they are so advised, at the subsequent stage

of the suit, as they may decide.

The refusal to examine the learned counsel for the Plaintiffs and rejection of the application therefore cannot have any impact on the present

question. Even then the rejection of the application by the learned trial court and refusal to examine the learned counsel by it was not challenged

though it was so open to be challenged in revision by the Defendant. At the same time the order rejecting the application to examine the Plaintiffs

counsel by the revisional court was also not challenged.

17. In that view of the matter the order rejecting the application for examination of the learned counsel for the Plaintiff will not prevent or preclude

the Defendants from making such an application at the later stage and if such an application is made the same should be dealt with on its merit

according to law.

18. For all these reasons I am not inclined to interfere with the orders impugned in the present revisional application. The writ petition, therefore,

fails and is accordingly dismissed.

19. There will, however, be no order as to costs.