

(2004) 03 GAU CK 0028

Gauhati High Court

Case No: C.R.P. No. 252 of 2001

Asma Khatun and Another

APPELLANT

Vs

Md. Mahmad Ali and Others

RESPONDENT

Date of Decision: March 23, 2004

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, Order 23 Rule 1(1), 151
- Contract Act, 1872 - Section 17

Citation: (2004) 2 GLT 144

Hon'ble Judges: P.P. Naolekar, C.J

Bench: Single Bench

Advocate: B. Banerjee, for the Appellant; B.C. Das, S. Roy and B. Kar Purkayashtha, for the Respondent

Final Decision: Allowed

Judgement

P.P. Naolekar, C.J.

Facts necessary for adjudication of the question involved in this revision are - the petitioners in this revision viz. Mustt Asma Khatun and Mustt Hunsa Khatun as plaintiff Nos. 2 and 3 along with Md Safiqur Rahman Laskar as plaintiff No. 1 (Opposite party No. 3 herein) have filed a suit against the defendants Md Mahmad Ali, Mustt Salema Bibi, (Opposite party Nos. 1 and 2 herein), seeking declaration of right, title and interest in respect of the Schedule -1 land and for confirmation of possession and for injunction restraining the defendants from dispossessing them from the Schedule-1 land and for possession of the land described in Schedules 2 and 3. The suit was registered as Title Suit No. 145/97 in the Court of Civil Judge (Junior Division) No. 1, Silchar.

2. It is alleged by the petitioners that during pendency of the suit on the intervention of village elders "bichar" was held and the elders proposed that the suit land would be surveyed and merged and thereafter the defendants would vacate

the land excess in their possession after harvesting the paddy. Three months time was given to the defendant to vacate the land in their possession. As per the proposal made by the elders an application No. 112/6 was filed on 7.8.1998 by the plaintiff No. 1 in the TS No. 145/97 for permission to withdraw the suit. Acting on the said application, the Court dismissed the suit as withdrawn by the plaintiffs. The order dated 7.8.1998 records "the plaintiff No. 1 is present alongwith the learned Advocate. Learned lawyer for the plaintiffs P.K. Deb submits that all the plaintiffs are willing to withdraw the suit, alongwith other plaintiffs, viz. Plaintiff Nos. 2 and 3 have not appeared today. Seen the petition No. 112/6 filed by the plaintiff No. 1 Safiqur Rahman, which is not signed by the other plaintiffs. However, on the basis of the submission of the learned lawyer for all the plaintiffs, the suit is disposed of on withdrawal by the plaintiffs.

3. As the decision given by the village elders and agreed upon by the defendants, had not been acted upon by the defendants, inasmuch as, they have not vacated their possession from the part of the suit land. The plaintiffs in these circumstances, instituted another suit before the Civil Judge No. 1 (Jr. Division) Silcahar, being Title Suit No. 131/99, against the defendants for setting aside the order of dismissal passed on 7.8.1998 in TS No, 145/97 praying for relief of restoration of the suit on file and claimed declaration that the dismissal of the suit as withdrawn was illegal, as because it was procured on false representation and playing fraud by the defendants upon the plaintiff No. 1. The defendants submitted their written statement. The Court framed a preliminary issue as to the maintainability of the Title Suit No. 131/99. On consideration, the suit was dismissed as not maintainable by order dated 14.11.2000. However, the Court granted liberty to the plaintiffs either to apply before the Court in Civil Suit No. 145/97 for withdrawal of the application filed in the said suit or to prefer a revision for getting the order set aside, subject to bar of limitation. Thus the Court has permitted the plaintiffs to move an application for restoration of the suit to its original number and file application for setting aside the order of dismissal of the suit as withdrawn.

4. An application was filed in Title Suit No. 145/97 by the plaintiff Nos. 1 and 2 (petitioners) on 18.12.2000 seeking direction from the Court permitting them to withdraw the withdrawal application No. 112/6 dated 7.8.1998 and for trial of the suit after restoration and to set aside the order of dismissal of the suit as withdrawn. The trial Court by its order dated 28.6.2001 rejected the application holding that the application tantamounts to an application for review and barred by limitation, although the Court has found that the original application No. 112/6 filed in TS No. 145/97 was filed by plaintiff No. 1 only and as per the provisions of Order 23 Rule 5 of CPC the single plaintiff cannot move an application for withdrawal of the suit without consent of other plaintiff. Being aggrieved by the order of the trial Court in dismissing the application, the present revision is filed.

5. I have heard the learned counsel appearing for the respective parties.

In the facts of the case, it is apparent that the application has been moved by the plaintiffs for withdrawal of the application of withdrawal of the suit on the direction issued by the Court in the civil suit. The ground alleged in the application is that fraud has been played on the plaintiff No. 1 by the defendants, who had filed the application for withdrawal of the suit. It is further alleged that the plaintiff No. 1 has filed the withdrawal application without the consent of the plaintiff Nos. 2 and 3, therefore, the Court could not have exercised the power of disposing of the entire suit on an application filed by the plaintiff No. 1 alone, particularly so, when the Court has seen that the application for withdrawal of the suit has not been signed by the plaintiff Nos. 2 and 3/ the petitioners herein.

It is argued by the learned counsel for the petitioners that the trial Court has committed an error in considering the application filed by the petitioner as an application for review of the judgment and thereby dismissing it holding it to be barred by limitation. In the circumstances of the case, the application was, in fact, for invoking the jurisdiction of the Court u/s 151 of the Code of Civil Procedure.

6. The real questions, which fall for consideration in this case is - If the plaintiff moved the application for withdrawal of the suit, without consent of the other plaintiffs; and once the order is passed on withdrawal application, whether jurisdiction can be exercised by the Court permitting the plaintiff to withdraw the application for withdrawal of the suit and consequence thereof set aside the order of withdrawal passed by the Court, or order of withdrawal attains finality so far that Court is concerned and Court becomes functus officio in the matter. In [Yeshwant Govardhan Vs. Totaram Avasu and Others](#), the High Court of Bombay has considered the question whether the plaintiff would be permitted to withdraw his application for withdrawal of his suit, so long as the withdrawal has not become effective by an order of the Court. The Court says that it is true that Order XXIII, Rule 1 does not require in terms that the Court should make an order in case in which the plaintiff withdraws his suit without any permission to bring a fresh suit. But under Order XXIII, Rule 1 the Court has to make an order about cost, which suggests that the Court has to make an order after the plaintiff withdraws his suit. Moreover, the consequence of the plaintiff, withdrawing his suit, is to debar the plaintiff from instituting any fresh suit in respect of the subject matter or part of the claim withdrawn by him. Surely, if that is the consequence of the withdrawal, the proceedings before the Court must show that the plaintiff has withdrawn either his suit or part of his claim. Therefore, the Court below was wrong in holding that it was not open to the plaintiff to withdraw his application for withdrawal. As per the Division Bench of the Bombay High Court, till the order is passed by the Court the application can be moved for withdrawal of the suit and the Court has jurisdiction to pass an order on an application for withdrawal of the suit. We may note that this is not a case, where the question for consideration of the application crops up after the order of withdrawal is being passed by the Court.

7. In [Smt. Raisa Sultana Begam and Others Vs. Abdul Qadir and Others](#), the Allahabad High Court took a different view. The question before the Court was - Can the plaintiff who has already moved an application under Sub-rule (1) of Order XXIII, Rule 1 CPC withdraw the application for the withdrawal of the suit before orders are passed on the withdrawal application ? As per the Division Bench the right to withdraw has been given to the plaintiff under the statute through Sub-rule (1) of Rule 1 of Order XXIII of the CPC. The right is not fettered by any condition. It is an absolute right, which the plaintiff can exercise at his sweet will at any time without permission from the Court, before the judgment is delivered. The matter would be different when the application for withdrawal is filed seeking leave of the Court to withdraw the suit with liberty to institute a fresh suit in respect of the same subject matter or part thereof. In the first case, the plaintiff does not need consent of the defendant or permission or confirmation of the Court. No act is required to be done by the Court to complete or effectuate a plaintiff's withdrawal of his suit. There is no provision for any act to be done in the suit by the Court for making the withdrawal effective or even after the withdrawal it is not even required to pass any order. Withdrawal of a suit is itself its end. A plaintiff withdrawing his suit is liable for such costs as the Court may award, so the Court is empowered to pass an order only in respect of the costs. The liability for costs arises out of the plaintiff's withdrawing his suit, the suit has been withdrawn and consequently he becomes liable. The Court's order awarding costs against him is a consequence of the withdrawal, which means that the withdrawal is already complete and in effect. The order is not an element of the withdrawal and is not required to complete or effectuate it. According to the Division Bench, the moment the application for withdrawal is filed for permission under proviso to Sub-rule (1) of Rule 1 of Order XXII, the suit shall stand withdrawn and therefore, neither the plaintiff has any right nor the Court could entertain an application for withdrawal of the withdrawal application. The Court further has drawn a distinction between the withdrawal in fact and withdrawal in law. If the suit is withdrawn in fact as well as in law no application to revoke the withdrawal is maintainable. However, a party alleges that there was indeed no withdrawal in law as the withdrawal was induced by fraud the dictum that no revocation of an application to withdraw is maintainable would not be applicable.

8. A Division Bench of the Calcutta High Court in the matter of Rameswar Sarkar v. State of West Bengal AIR 1986 CAL. 79 has applied the provisions of Section 151 of the CPC in a situation, where the plaintiff's suit was ordered to be withdrawn on an application moved by the plaintiff. The withdrawal being affected on account of mistake or on account of fraud being played either on the plaintiff or on the Court. The Court has applied the provisions of Section 151 CPC and held it to be of wide amplitude and are being applicable in a situation where there is no provision of CPC covering the situation and when the ends of justice requires exercise of the power by the Court. The Division Bench of the Calcutta High Court applied the provisions of Section 151 in the facts of the case and has held that the application can be moved

for withdrawal of the application of withdrawal of the suit even after the order on application of withdrawal of the suit was already passed by the Court.

9. In a recent decision of the Allahabad High Court reported in [State Bank of India Vs. Firm Jamuna Prasad Jaiswal and Sons](#), the Court has held that withdrawal of application for dismissing the suit or appeal as withdrawn is maintainable if fraud is played upon the plaintiff or upon the appellant as the case may be. The Court was of the view that where the Court exercises its inherent power u/s 151 of CPC, the Court is not restricted or limited by provisions of the Code and the Court is justified in exercise of the inherent powers of the Court, in case the Court finds that injustice has been done between the parties before it.

10. In the present case, there is a specific allegation of fraud being played by the defendants, who motivated the plaintiff No. 1 to move an application for withdrawal of the suit and obtain the order on the application. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct. Michal Levi likens a fraudster to Milton's sorcerer, Comus, who exulted in his ability to, "wing me in to the easy-hearted man and trap him into snares". It has been defined as an act of trickery or deceit. In Webster's Third New International Dictionary, fraud in equity has been defined as an act or omission to act or concealment by which one person obtains an advantage against conscience over another or which equity or public policy forbids as being prejudicial to another. In Black's Legal Dictionary, fraud is defined as an intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right; a false representation of a matter of fact whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives and is intended to deceive another so that he shall act upon it to be his legal injury. In Concise Oxford Dictionary, it has been defined as Criminal deception, use of false representation to gain unjust advantage; dishonest artifice or trick. According to Halsbury's Laws of England, a representation is deemed to have been false, and therefore a misrepresentation, if it was at the material date false in substance and in fact. Section 17 of the Contract Act defines fraud as act committed by a party to a contract with intent to deceive another. For dictionary meaning or even otherwise fraud arises out of deliberate active role of representator about a fact which he knows to be untrue yet he succeeds in misleading the representee by making him believe it to be true. The representation to become fraudulent must be of fact with knowledge that it was false.

11. It is obvious that any decision obtained by the use of a fraud in any proceeding or transaction, which will result in the transaction a nullity even the most solemn proceedings in any civilised system of jurisprudence, if they are actuated by fraud.

12. In the case in hand, the question raised before the Court is whether the application for withdrawal of the suit was the result of the fraud played by the

defendants on plaintiff No. 1, which was actuated him to move an application for withdrawal of the suit, not only that whether there was any application for withdrawal in law, and was there any order of the Court permitting withdrawal, to be read as an order of withdrawal in law. It is the case of the applicants before the Court, that they were not party to the application for withdrawal of the suit, the Court was not authorised to pass an order of withdrawal of their suit by virtue of Sub-rule (5) of Rule 1 of Order XXIII, which envisages that 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. One of the plaintiffs can withdraw the suit by filing an application for withdrawal of the suit only if there is consent of other plaintiffs. If there is no consent of other plaintiffs, the Court does not have the authority to allow the withdrawal of the suit of the plaintiffs, who was not a party to the application for withdrawal of the suit.

13. An application was moved before the Court below by the petitioners making allegations therein that the withdrawal application has been actuated on account of a fraud played by the defendants and that the petitioners as plaintiffs were not signatories to the application for withdrawal of the suit, nor consent was given to the plaintiff No. 1 to move the application for withdrawal of the suit, therefore, Court's authority to pass an order itself was without jurisdiction. The question raised are the question required consideration by the Court, the application could not have been dismissed by the trial Court assuming that the application is an application for review. For the aforesaid reasons, in my opinion, there is no doubt that the order of the trial Court dismissing the application for withdrawal of the application for withdrawal of the suit was the result of the Court's refusal to exercise the powers and jurisdiction vested in it. In that view of the matter, the present revision is allowed with a direction to the Court below, that the Court shall admit the application for withdrawal of the application of the suit filed by the petitioners and after hearing the parties shall pass order thereon, in accordance with law.

14. In the result, the revision petition is allowed. No order as to costs.

The record of the Court below be sent back forthwith.