(2012) 06 CAL CK 0066

Calcutta High Court

Case No: C.O. No. 316 of 2012

Sajeda Khatoon		APPELLANT
	Vs	
Shah Ata Hossain and Others		RESPONDENT

Date of Decision: June 11, 2012

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 2 Rule 2, Order 2 Rule 2(1), Order 23 Rule 1, Order 23 Rule 1(1), Order 23 Rule 1(3)
- Waqf Act, 1995 - Section 14(1), 14(1)(e), 6, 7, 85

Citation: (2012) 3 CALLT 708 : (2012) 4 CHN 707

Hon'ble Judges: Soumen Sen, J

Bench: Single Bench

Advocate: S.P. Roy Chowdhury, Mr. N. Chowdhury, Mr. Yamin Ali, Mrs. Soma Roychowdhury and Mr. Asif Ali, for the Appellant;Sahidullah Munsi and Mr. Samit Bhanja, for the Respondent

Final Decision: Allowed

Judgement

Soumen Sen, J.

The order allowing a petition filed under Order 2 Rule 2 read with section 151 of the CPC filed after conclusion of evidence and before argument was allowed by the learned Presiding Officer, Wakf Tribunal, West Bengal in Suit No. 9 of 2009 is the subject-matter of challenge in this revisional application. The principal issue raised in this revisional application is the jurisdiction of the Wakf Tribunal to allow an application under Order 2 Rule 2 read with section 151 of the CPC after conclusion of evidence and before argument.

2. In order to appreciate the aforesaid contention, the following provisions of the CPC and the Wakf Act, 1995 are required to be taken into consideration:-

(i) Order 2 Rule 2. CPC.

2. Suit to include the whole claim.- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim. - Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs. -A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.

(ii) Order 6 Rule 17 CPC.

17. Amendment of pleadings. - The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

(iii) Order 23 Rule 1 CPC.

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.

Sections 6, 7 and section 85 of the Wakf Act, 1995 are reproduced hereinbelow:-

6. Disputes regarding wakfs. - (1) If any question arises whether a particular property specified as wakf property in the list of wakfs is wakf property or not or whether a wakf specified in such list is a Shia wakf or Sunni Wakf, the Board or the mutawalli of the wakf or any person interested therein may institute a suit in a Tribunal for the decision of the question and the decision of the Tribunal in respect of such matter shall be final:

Provided that no such suit shall be entertained by the Tribunal after the expiry of one year from the date of the publication of the list of wakfs.

7. Power of Tribunal to determine disputes regarding wakfs. - (1) If, after the commencement of this Act, any question arises, whether a particular property specified as wakf property in a list of wakfs is wakf property or nor, or whether a wakf specified in such list is a Shia wakf or a Sunni Wakf, the Board or the mutawalli of the wakf, or any person interested therein, may apply to the Tribunal having jurisdiction in relation to such property, for the decision of the question and the decision of the Tribunal thereon shall be final:

Provided that -

(a) in the case of the list of wakfs relating any part of the State and published after the commencement of this Act no such application shall be entertained after the expiry of one year from the date of publication of the list of wakfs:

and

(b) in the case of the list of wakfs relating to any part of the State and published at any time within a period of one year immediately preceding the commencement of this Act, such an application may be entertained by Tribunal within the period of one year from such commencement:

Provided further that where any such question has been heard and finally decided by a civil court in a suit instituted before such commencement, the Tribunal shall not re-open such question.

(2) Except where the Tribunal has no jurisdiction by reason of the provisions of sub-section (5), no proceeding under this section in respect of any wakf shall be stayed by any court, tribunal or other authority by reason only of the pendency of any suit, application or appeal or other proceeding arising out of any such suit, application, appeal or other proceeding.

(3) The Chief Executive Officer shall not be made a party to any application under sub-section (1).

(4) The list of wakfs any where any such list is modified in pursuance of a decision of the Tribunal under sub-section (1), the list as modified, shall be final.

(5) The Tribunal shall not have jurisdiction to determine any matter which is the subject-matter of any suit or proceeding instituted or commenced in a Civil Court under sub-section (1) of section 6, before the commencement of this Act or which is the subject-matter of any appeal from the decree passed before such commencement in any such suit or proceeding or of any application for revision or review arising out of such suit, proceeding or appeal, as the case may be.

85. Bar of jurisdiction of Civil Courts. - No suit or other legal proceeding shall lie in any Civil Court in respect of any dispute, question or other mailer relating to any wakf, wakf property or other matter which is required by or under this Act to be determined by a Tribunal.

3. Mr. S.P. Roy Chowdhury, learned Senior Advocate appearing on behalf of the petitioner submits that Order 2 Rule 2 could not be available to the plaintiff after institution of the suit. The CPC does not permit such an application to be filed after the institution of the suit. Moreover, in the present ease, the said application was filed after conclusion of trial and at the argument stage. At that stage, the Court has no jurisdiction to allow such an application to be filed for relinquishment of the claim. He submitted that in the event, at the time of trial, the plaintiff feels that some of the reliefs cannot be granted by the Tribunal on an application made the Tribunal in exercise of its power under Order 7 Rule 10 of the CPC should direct return of the plaint to the appropriate Court having jurisdiction to consider the same.

4. In support of the aforesaid contention. Mr. Roy Chowdhury relied upon the following decisions:-

(i) AIR 1943 293 (Nagpur)

(ii) AIR 1953 Hyd. 230 (Vishnu & Ors. v. Jawaher Mall & Ors.):

(iii) Kewal Singh Vs. Smt. Lajwanti,

(iv) Manthan Brand Band Services Pvt. Ltd. and Another Vs. C.K.T. Communications Pvt. Ltd.,

(v) 1997 AIHC 4120 (Nizar Sadaruddin Khoja v. Vaibhav Construction)

5. It is submitted on behalf of the petitioner that Order 2 Rule 2(1) deals with the frame of the suit and does not refer to a case of abandonment of part of the claim after the suit is filed, or impose on any Court an obligation to allow a plaint to be amended. Such submission is based on the decision of the Division Bench of the Nagpur High Court in Sobhagsingh (supra). It is on the basis of the aforesaid decision it is argued that after the conclusion of trial and before argument, such application under Order 2 Rule 2 is not maintainable.

6. In Sobhagsing (supra) it was found that the plaint originally filed, has been properly and correctly valued and was filed in the proper Court, namely, the Additional District Judge. The plaintiff subsequently wanted to withdraw from his claim, the amount of profits of the first four years on the ground that he cannot prove them. Initially, the plaint was presented before the Subordinate Judge, 2nd Class, but in the said Court, the valuation of the suit was contested and after evidence was taken, it was found that the suit valuation was not properly assessed and, accordingly, this plaint was represented before the Additional District Judge. The valuation in the plaint was raised in view of a finding reached as to valuation regarding profits, of which accounts have been kept and on the basis of such judicial finding, the plaint was returned and presented before the Additional District Judge after the plaint was represented before the said Additional District judge and pleadings were complete. The plaintiff came to a conclusion that his legal right

would, owing to question of res judicata, stand on a better footing if he managed to get his suit tried in the Court of the Subordinate Judge. 1st Class.

7. It is admitted in the said application that the plaintiff decided to withdraw his claim for the profits of the first four years since he would be unable to prove for same and ask for permission to amend the plaint and to restore it to its original position, that is to say, the plaint as it stood for the claim for four years profits. The relevant observations of the Division Bench in this regard are reproduced hereinbelow:-

We would put the matter in this way: The object of an amendment is to enable the Court, before whom a case is pending, to do justice between the parties in a trial of the case, and not to take the case away from the Court which has jurisdiction, in cases of valuation as a result of contest or as a result of the discovery of a mistake it may be found that a suit is undervalued. In such a case the suit need not be dismissed on the ground that it has not been filed u/s 15, Civil PC., in the Court of the lowest grade competent to try it, but it is proper to pass an order which enables the plaintiff to take his suit to the lower Court in order to have it tried on merits. Here the position is that no question of the correctness of the valuation has ever arisen and the plaintiff has discovered no error in his valuation. The suit is instituted was properly valued, and later the plaintiff has applied to withdraw a part of his claim.

In our judgment Order 2, Rule 2(1) deals with the frame of the suit and does not refer to a case of abandonment of part of the claim after the suit is filed or impose on any Court an obligation to allow a plaint to be amended. If Order 2, Rule 2(1) applied to proceedings after the suit was filed, a plaintiff who anticipated an adverse result after the evidence was almost concluded, would have an absolute right to relinquish part of his claim and obtain an amendment of the plaint and take the case into another Court where the deficiencies in his evidence could be supplied at a new trial. We, therefore, do no consider that the right given by Order 2, Rule 2(1) subsists after the plaint has been filed. This being so, what is the position? The plaint is valued correctly and is filed in the proper Court, that of the Additional District Judge. The plaintiff wishes to withdraw from his claim the amount of profits of the first four years, on the ground that he cannot prove them. In the circumstances there is nothing whatever to prevent the suit from proceeding, and any amendment of the plaint is wholly unnecessary in order to do justice to the parties and proceed with the trial.

We consider that Order 2, Rule 2(1) gives no power to plaintiff to obtain leave to amend on relinquishing part of his claim, and that on general principles a Court which is empowered to dispose of the case whether part of the claim is withdrawn or whether it is not withdrawn, should not permit a plaint to be amended simply and solely for the purpose of depriving itself of the jurisdiction which it possesses. It is true that the plaintiff can choose the forum in the first place by deciding how much

property or how many years accounts he wishes to be included in the suit, but having once chosen the forum he has, in our judgment, no power to alter the forum merely because he relinquishes part of his claim. In our judgment the action of the lower Court in allowing the plaint to be amended so as to deprive itself of jurisdiction was an action which was unnecessary and misconceived, and we consider that this appeal should be allowed and the plaint as originally represented tried in the Court of the Additional District Judge. The plaintiff should be required by the trial Court to clarify his position. If he wishes to withdraw part of his claim irrespective of the question of amendment, he must be required to say so. If he wishes for an order under Order 23, Rule 2, he must say so.

In Vishnu (supra), the Hon''ble Division Bench while construing Order 2 Rule 2 held as follows:-

Where on the date when the suit is instituted the Court did not have the requisite pecuniary jurisdiction over the subject-matter of the suit it cannot acquire jurisdiction by reason of the plaintiffs'' relinquishing a portion of the claim at a later stage of the suit. The relinquishment contemplated by Order 2 Rule 2 in order to bring the suit within the jurisdiction of a Court is before the institution of the suit, and not at any subsequent stage.

In Kewal Singh (supra), the Hon''ble Supreme Court was considering the question of applicability of Order 2 Rule 2 of the CPC on the face of an objection raised that the second application filed by the plaintiff for reamending her plaint by inserting relief u/s 14(1)(e) which she had given up on a prior occasion when she had based her suit u/s 14A(1) was barred by the principles of Order 2 Rule 2 of the Code of Civil Procedure. It was also contended that even if Order 2 Rule 2 CPC had no manner of application, the second application for amendment filed by the plaintiff would be barred by the doctrine of constructive resjudicata. In deciding the said issues, the Hon''ble Supreme Court held as follows: -

5. So far as the first two contentions are concerned, we are of the opinion that they do not merit any serious consideration. Regarding the question of the applicability of Order 2 Rule 2 CPC the argument of the learned Counsel for the appellant is based on serious misconception of law. Order 2 Rule 2 CPC runs thus:-

2(1). Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2). Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

A perusal of Order 2 Rule 2 would clearly reveal that this provision applies to cases where a plaintiff omits to sue a portion of the cause of action on which the suit is

based either by relinquishing the cause of action or by omitting a part of it. The provision has, therefore, no application of cases where the plaintiff bases his suit on separate and distinct causes of action and chooses to relinquish one or the other of them. In such cases, it is always open to the plaintiff to file a fresh suit on the basis of a distinct cause of action which he may have so relinquished.

6. In the case of Mohammad Khalil v. Mahbub Ali Mian, (1948) 75 Ind App 121 the Privy Council observed as follows:-.

That the right and its infringement, and not the ground or origin of the right and its infringement, constitute the cause of action, but the cause of action for the Oudh suit (No. 8 of 1928) so far as the Mahbub brothers are concerned was only a denial of title by them as that suit was entirely against Abadi Begam for possession of the Oudh property: whilst in the present suit the cause of action was wrongful possession by the Mahbub brothers of the Shahjahanpur property, and that the two causes of action were thus different.

Their Lordships are satisfied that there is no force in the contention that the plaintiffs in the present suit could not reasonably commence an action in respect of the Shahjahanpur property while their right to mutation in the Revenue registers was the subject of an appeal to the Commissioner, which had not been decided, or in other words, that it was not open to them to sue the defendants in respect of the Shahjahanpur property at a date earlier than October 29, 1928 and to include the Shahjahanpur property in the earlier suit No. 8 instituted on September 14, 1923.

The principles laid down in the cases thus far discussed may be thus summarized: (1) the correct test in cases falling under Order 2 Rule 2 is "whether the claim in the new suit is, in fact, founded on a cause of action distinct from that which was the foundation for the former suit, (Moonshee Buzloor Ruheem v. Shum-soonnissa Begum. (1867) 11 Moo Ind App 551 (605). (2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment (Read v. Brown, (1889) 22 QBD 128, 131). (3) If the evidence to support the two claims is different then the causes of action are also different (Brunsden v. Humphrey, (1884) 14 QBD 141). (4) The causes of action in the two suits may be considered to be the same if in substance they are identical. (Brunsden v. Humphrey). (5) The cause of action has no relation whatsoever to the defence that may be set up by the defendant, nor does it depend on the character of the relief prayed for by the plaintiff. It refers "to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour." (Muss. Chand Kour v. Partap Singh. (1887-88) 15 Ind App 156 (PC)). (6) This observation was made by Lord Watson in a case u/s 43 of the Act of 1882 (corresponding to Order 2 Rule 2) where plaintiff made various claims in the same suit.

7. Applying the aforesaid principles laid down by the Privy Council we find that none of the conditions mentioned by the Privy Council are applicable in this case. The

plaintiff had first based her suit on three distinct causes of action but later confined the suit only to the first cause of action, namely, the one mentioned in section 14A(1) of the Act and gave up the cause of action relating to section 14(1)(e) and (f). Subsequently, by virtue of an amendment she relinquished the first cause of action arising out of section 14A(1) and sought to revive her cause of action based on section 14(1)(e). At the time when the plaintiff relinquished the cause of action arising out of section 14(1)(e) the defendant was not in the picture at all. Therefore, it was not open to the defendant to raise any objection to the amendment sought by the plaintiff. For these reasons, we are satisfied that the second amendment application was not barred by the principles of Order 2 Rule 2 CPC and the contention of the learned Counsel for the appellant must fail.

8. Secondly, as regards the question of constructive res judicata it has no application whatsoever in the instant case. It is well settled that one of the essential conditions of res judicata is that there must be a formal adjudication between the parties after full hearing. In other words, the matter must be finally decided between in the parties. Here also at a time when the plaintiff relinquished her first cause of action the defendant was nowhere in the picture, and there being no adjudication between the parties the doctrine of res judicata does not apply. The second amendment application was made in the same proceedings on a cause of action that she was allowed to insert with the permission of the Court. Although both the parties went to the court on the basis of these facts, neither the bar of resjudicata nor that of Order 2 Rule 2 appear to have been raised before the Rent Controller. For these reasons, therefore, the second plank of argument put forward by counsel for the appellant also must be rejected.

8. In Manthan Brand (supra), the Hon''ble Division Bench of our High Court was considering an application for temporary injunction and in deciding the said application, it was found that on the face of the averments made in the plaint, it can be safely concluded that the suit has been grossly undervalued and, accordingly, the questions that fall for determination in the appeal was whether the suit was really undervalued and if it is so, whether plaintiffs can before an Appellate Court dealing with an appeal against and order of injunction can abandon a part of the claim of the suit so as to justify passing of the order of temporary prohibitory and mandatory injunction by a Court having no pecuniary jurisdiction.

9. The Hon''ble Division Bench on a reading of the plaint found that the suit has been grossly undervalued and accordingly, it was held that the Trial Judge should not have entertained the application for temporary prohibitory injunction or mandatory injunction but instead, ought to have returned the plaint for presentation before appropriate forum. The Hon''ble Division Bench observed as follows: -

19. If it appears to the Appellate Court that prima facie the learned Trial Judge had no pecuniary jurisdiction but notwithstanding such fact, it granted an order of

injunction with a finding that the plaintiff proved prima facie case, such order is liable to be set aside, because of the findings of the Appellate Court that prima facie the Court had no pecuniary jurisdiction even on the basis of the averments made in the plaint and the suit was deliberately under-valued to bring it within the jurisdiction of the Court.

20. It is true that the plaintiff can at any point of time abandon part of his claims but such relinquishment can be made by filing appropriate application under Order 6 Rule 17 of the Code by amending the plaint.

21. It is now settled position of law that if the Court does not have pecuniary jurisdiction to entertain a particular suit as it stands, it has no power to entertain and allow an application for amendment of plaint for the purpose of reducing the value of the claim so as to bring it within the jurisdiction of the Court.

In such a situation, if the plaintiff wants to relinquish part of the claims by filing an application for amendment of plaint, the Court should return the plaint along with the application for amendment of plaint to the learned Advocate for the plaintiff for presentation before the Court where it sought to have been filed.

It is not even possible for the learned Trial Judge to allow an application for amendment of plaint thereby permitting the plaintiff to relinquish some of the relief. Question to be dealt with by the appropriate Court, if such an application is filed. The plaintiffs cannot pray for abandoning part of the claims for the purpose of justifying an order of injunction passed in a suit which is prima facie undervalued.

10. The said decision is, however, distinguishable on facts. In this case, the issue is with regard to the jurisdiction of a special Tribunal to grant certain reliefs unlike the Civil Courts which exercise a plenary jurisdiction in terms of section 9 of the CPC depending upon four factors, namely.

(i) pecuniary

(ii) territorial

(iii) subject-matter and

(iv) cause of action, wholly or partly.

A special Tribunal can decide only such matters which are specified in the Act and any application for deletion or abandonment of any claim on the ground that such reliefs cannot be granted by the Tribunal in view of the fact that the subject-matter of the dispute is beyond its jurisdiction can only be considered by the Tribunal before whom such proceeding is pending.

11. In Nizar Sadaruddin (supra), the learned single Judge of the Gujarat High Court differed from the Bombay view Shobha Venkat Rao Vs. K.R. Mahale, in holding that relinquishment of claim in order to bring it within pecuniary jurisdiction of the Court

is to be made before institution of suit and not at any subsequent stage. The relevant observations on the Gujarat High Court are in Paragraph 12, 14 and 15 reproduced hereinbelow:-

12. Order 2. Rule 2 of the Code provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court: Thus, it is clear that whenever claim is to be relinquished the same has to be relinquished by the plaintiff before institution to facilitate choosing of forum. This provision cannot be pressed into service after the suit is instituted. On this point, learned Advocate for the respondent has invited my attention to a judgment in the case of Vishnu v. Jawaher Mall. AIR 1953 Hyd. 230 which clearly says that if on the date of institution of the suit the Court has no requisite pecuniary jurisdiction over the subject-matter of the suit, it cannot acquire jurisdiction by reason of the plaintiffs relinquishing a portion of the claim at a later stage. Relinquishment contemplated by Order 2, Rule 2 of the Code in order to bring the suit within the jurisdiction of a Court is before the institution of the suit and not at any subsequent stage. Similar view has also been taken by Madras High Court in the case of Kannusami v. Jagathambal, AIR 1919 Mad. 1971. It has also been held that if the suit is grossly undervalued and on facts it appears to the Court that it has no jurisdiction and had discovered that the subject-matter of the suit is beyond its jurisdiction, proper step would be to take recourse to Order 7, Rule 10 of the Code and return the plaint but not rejection or withdrawal. Similarly, inherent lack of jurisdiction cannot be cured by subsequent amendment of plaint under Order 6, Rule 17 of the Code. In this regard Patna High Court in the case of Pandit Rudranath Mishir and Others Vs. Pandit Sheo Shankar Missir and Others, , has held that granting of amendment postulates an authority of the Court to entertain the suit. But where there is inherent lack of jurisdiction in the Court to entertain the suit itself, it cannot make any order for amendment of the plaint to bring the suit within its jurisdiction. Despite inherent lack of jurisdiction if the Court exercises jurisdiction which is not vested would amount to usurping a jurisdiction not vested in it. In such a case, instead of exercising jurisdiction and allowing amendment of plaint, proper course would be to return the plaint to the plaintiff for presenting before proper Court in which the suit ought to have been instituted.

14. Mr. Jani for the petitioner has relied upon the judgment of Bombay High Court in the case of Shobha Venkat Rao Vs. K.R. Mahale, wherein it is held that Order 2, Rule 2 of the Code is not the only provision in the Code for voluntary relinquishment of claims or parts of claims but can also relinquish at any stage of the suit under Order 23. Rule 1 of the Code and by invoking the provisions of Order 23. Rule 1 and abandoning a part of claim the Court can be invested with pecuniary jurisdiction. For doing so even a statement is sufficient and amendment of plaint is not necessary. It is true that after institution of suit the plaintiff may as against all or anyone of the respondent abandon his suit or abandon a part of claim. By making this provision

the intention of the legislature is very clear that the plaintiff can abandon a part of his claim at any stage of suit after institution but nonetheless contemplates divesting or investing with jurisdiction which otherwise does not have. The moment the suit is filed the plaintiff requires the Court to decide the entire claim arising from the cause of action but if during pendency the plaintiff for some reasons desires to abandon a part of claim, may abandon his claim and by doing so requests the Court not to decide the part of the claim as he docs not press against the defendant. Such an abandonment does not relate back to the date of institution and affect the jurisdiction. By abandonment under Order 23, Rule 1 the institution of suit remains unaffected that is, the jurisdiction of the Court to try the claim as a whole does not get vitiated but simpliciter the Court is requested not to apply mind to that particular part of claim which is sought to be abandoned under Order 23, Rule 1 of the Code. In this view of facts. I do not agree with the view subscribed by Bombay High Court in Shobha''s case (supra).

15. As per well settled principle of law, suit is to be instituted in a proper Court having jurisdiction, may be pecuniary, territorial or statutory, institution of a suit in a Court with inherent lack of jurisdiction, the institution itself will be bad and the Court cannot entertain. Since this is the legal position the Court cannot deal with any application under Order 6. Rule 17 of the Code with a view to invest or divest with jurisdiction which otherwise the Court did not have initially at the time of institution. Any such order would be without jurisdiction. Once the suit is filed, in a Court having proper jurisdiction, it is always open to the plaintiff, at any stage of the suit, to relinquish or abandon a part of claim under Order 23, Rule 1 of the Code. This can be done by mere declaration which Court may record. Such abandonment/relinquishment shall not have any effect upon jurisdiction because on the date of institution the Court enjoyed jurisdiction and still enjoys but the plaintiff does not want the Court to exercise jurisdiction qua that claim. Hence the Court has to proceed with the remaining claim for which the plaintiff requires to adjudicate. The simple analogy is that if on the date of institution of the suit the Court was invested with jurisdiction by subsequent abandonment the jurisdiction is not usurped or taken away but simpliciter the Court is required not to apply mind to that part of the claim. Thus, when suit is instituted in a Court with jurisdiction by subsequent abandonment of a part of the claim even if such an abandonment has effect of divesting with pecuniary jurisdiction then also the institution of suit does not get affected and the Court shall decide the matter in accordance with law.

12. Per contra, the learned Counsel appearing on behalf of the opposite party submits that irrespective of the nomenclature of the said application, the said application is really in the nature of amendment of the plaint and would be under Order 6 Rule 17 of the Code of Civil Procedure. It was further argued that Wakf Tribunal is a statutory body having limited jurisdiction and cannot be equated with the plenary jurisdiction exercised by a Civil Court.

13. If one looks at the scheme of the Code of Civil Procedure, the initiation of a suit is by filing a plaint. Order 2 of the CPC refers to the frame of suit. Order 2 Rule 2 requires that the suit should include the whole claim. After the suit is filed for any alteration or amendment of the pleading, an application is required to be filed under Order 6 Rule 17 of the CPC and the Court upon such application being made, may allow such amendment for the purpose of determining the real questions in controversy between the parties. Order 23 Rule 1 applies to abandonment of whole or part of the claim after the institution of the suit Order 2 Rule 2 operates in case intentional relinquishment or omission to issue in respect of part of the claim before the institution of the suit. The principle contained in Order 2 Rule 2 is designed to counter-act two evils, namely:-

(I) split up of claims:

(II) split up of remedies.

14. The principle underlying Order 23 Rule 1, however, is based on legal maxim beneficium non datur (law does not confer a benefit which a person does not want). There is also a distinction between abandonment and withdrawal under Rule 1(1) and 1(3) of Order 23. The said distinction was noticed in K.S. Bhoopathy v. Kokila (AIR 2000 SC 2132) where the Supreme Court held:-

The law as to withdrawal of suits as enacted in the present rule may be generally stated in two parts:

(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court: in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit: and

(b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the court enables the plaintiff to avoid the bar in Order 2 Rule 2 and section 11 CPC.

15. The learned Counsel for the opposite parties submits that the said application is necessitated by reason of the fact that some portions of the prayers made in the application could not be allowed by the Wakf Tribunal in view of lack of jurisdiction. In the application filed under Order 2 Rule 2 of the Code of Civil Procedure, it is staled that the plaintiff on proper scrutiny of the plaint felt that they would not press for some of the prayers although they are legally entitled to. It was also mentioned that in order to bring the suit within the jurisdiction of the said Tribunal and to avoid inconsistency, the plaintiff proposed to delete parts of the claim from the plaint.

16. The application filed under Order 2 Rule 2 is thoroughly misconceived. It could have been treated as an application under Order 6 Rule 17 or 23 Rule 1 of the CPC

for abandonment and deletion of some of the prayers from the plaint. It is doubtful as to whether at this stage after conclusion of the trial and at the argument stage, such amendment to the pleading could be allowed when the Tribunal is already in possession of the evidence and the suit is fixed for argument. The impugned order is silent on this issue. The grant of leave under Order 23 Rule 1 sub-rule (3) is in the discretion of the Court and the discretion is to be exercised properly, reasonably and on well-settled principles. Normally, the Court is required to be satisfied that (i) the prayer by the plaintiff is bona fide: and (ii) either of the two grounds specified in clause (a) (defect of a formal nature): or clause (b) (sufficient ground) exists. In that case, the Court is within its jurisdiction to grant the prayer of the plaintiff (Banari v. Chanchal, (1982) 86 CWN 878).

17. If the above conditions are satisfied, the court can pass the order even sua motu. An application by the plaintiff is not an essential requirement for the rule to apply.

18. The Court, before exercising power under Rule 1(3), must consider facts and circumstances in their entirety and make an appropriate order in the interest of justice. (K.S. Bhoopathy and Others Vs. Kokila and Others,

19. The Court may grant to the plaintiff permission to withdraw the suit with liberty to file fresh suit on the same cause of action on one of the two grounds enumerated in sub-rule (3), namely.-

(i) there is formal defect which must result in failure of suit: or

(ii) there are sufficient grounds to allow the plaintiff to grant such leave.

20. The expression "formal defect" has not been defined in the Code. It may, however, mean a defect of form prescribed by rules of procedure. The phrase "formal defect" should be interpreted liberally which should take within its sweep every kind of defect, not affecting the merits of the case.

21. The Wakf Tribunal is a creature of statute and its jurisdiction is circumscribed by the said statute. It does not enjoy a plenary jurisdiction unlike a Civil Court u/s 9 of the Code of Civil Procedure. It is needless to mention that it can exercise jurisdiction over the subject-matter referred to in the said statute and cannot travel beyond it. It appears that the matter is at the argument stage when such application was filed. If the Court has a jurisdiction to determine a part of the relief claimed it would confine itself thereto and would not reject the plaint in its entirety Church of North India Vs. Lavajibhai Ratanjibhai and Others,

22. The Tribunal at this stage cannot exercise its jurisdiction in entertaining the said application under Order 2 Rule 2 of the Code of Civil Procedure. It appears that plaintiff wants to abandon a part of its claim so as to bring its claim within the jurisdiction of the Tribunal. If it appears to the Tribunal that it lacks jurisdiction in deciding some of the issues, the Tribunal would give such finding and it is needless to mention that such finding cannot preclude the plaintiff from instituting suit in

proper forum in accordance with law having jurisdiction to decide such issue and such finding of the Tribunal with regard to lack of jurisdiction cannot operate as a res judicata. If the Tribunal has no jurisdiction, there cannot be any decision on merits on such issues. However, the order impugned cannot be sustained. The said order suffers from misconception of law and the learned Presiding Officer has completely misdirected its mind in deciding the said application treating the same as an application under Order 2 Rule 2 of the Code of Civil Procedure. Moreover, the learned Presiding Officer also did not indicate or give any reason for treating the said application as an application made under Order 2 Rule 2 of the CPC and allowing the said application. The said order does not disclose any reason. There is also no finding that the tribunal lacks jurisdiction in granting any relief in respect of some of the prayers which are now sought to be abandoned. The proper course in the facts and circumstances would have been to pronounce judgment on all issues after taking into consideration the averments made in the said application. It would be, however, open for the learned Presiding Officer to consider any application if filed for withdrawal and/or abandonment of the claim and deletion of any relief either under Order 6 Rule 17 CPC, (in view of Manthan Brand (supra)), or under Order 23 Rule 1 CPC praying for the self-same reliefs in accordance with law. The impugned order is set aside. The revisional application, thus, succeeds. However, there shall be no order as to costs.

Urgent xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.