R.Rathinavel Chettiar And Anr vs Sivaraman And Ors on 31 March, 1999

Author: S.Saghir Ahmad

Bench: S.Saghir Ahmad, D.P.Wadhwa

PETITIONER:
R.RATHINAVEL CHETTIAR AND ANR.

Vs.

RESPONDENT:
SIVARAMAN AND ORS.

DATE OF JUDGMENT: 31/03/1999

BENCH:
S.Saghir Ahmad, D.P.Wadhwa

JUDGMENT:

S.SAGHIR AHMAD, J.

V.Sivaraman (plaintiff-respondent No.1) filed a suit against Shakunthala, widow of his brother, for declaration of title to the suit property and for a direction to the defendants, namely, Shakunthala and Vinayagam, to put him in possession of that property and to pay the arrears of rent amounting to Rs.18,000/- together with further mesne profits. The suit was decreed by the trial court on 5th September, 1983 against which Shakunthala filed an appeal in the High Court and during the pendency of the appeal in that Court, the present appellants were impleaded as respondents by order dated 20.3.1985 passed in C.M.P. No.5008 of 1984. It was indicated in that application that three days after the decree was passed by the trial court, plaintiff (respondent No.1) sold the suit properties to the appellants and since the properties in suit had been assinged to them, they had to be impleaded as respondents as required by Order 22 Rule 10 C.P.C.

Respondent No.1, it appears, filed an application (C.M.P. No.15941 of 1987) in the High Court for dismissing the suit as not pressed as he had compromised the dispute with Shakunthala and wanted the compromise to be recorded. This application was allowed by the High Court by its judgment dated October 28, 1987 and it is against this judgment that the present appeals have been filed.

Mr. K. Parasaran, learned Senior Counsel appearing for the appellants, has contended that the suit which was decreed by the trial court should not have been dismissed as not pressed at the instance of respondent No.1 as he had already transferred the suit properties in favour of the appellants who,

being tranferees-pendente-lite were vitally interested in the decree remaining intact. It was further contended that respondent No.1 had been held to be the owner of the property in suit by the trial court and it was after a declaration was granted in his favour that the property was purchased by the appellants. The dismissal of the suit as not pressed at the appellate stage, had the effect of destroying the decree passed in favour of respondent No.1 and since the property in question, which was the subject matter of the suit, had already been transferred in favour of the appellants, the suit could not have been dismissed as not pressed at the instance of respondent No.1 who had ceased to be the owner of the property and in whose place the present appellants had become the owners and were, in that capacity, impleaded as respondents in the appeal.

Learned counsel for respondent Nos.1 and 2, on the contrary, contended that the plaintiff (respondent No.1) had an unfettered right to have his suit dismissed as not pressed. He, it is contended, cannot be forced by any of the parties to the suit, to continue to prosecute the suit. It is also contended that under Order 23 Rule 1 of the Code of Civil Procedure, respondent No.1 had the right to compromise the suit with Shakunthala (respondent No.2) against whom he had filed the suit and since the dispute between respondent Nos. 1 and 2 had been amicably settled by a compromise, it was open to respondent No.1 to apply to the Court to dismiss the suit as not pressed.

The relevant portion of Order 23 Rule 1 provides as under:-

> "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:
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> .....
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> (2) ..... (3) Where the Court is satisfied,-
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> (a) that a suit must fail by reason of some formal defect, or
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> (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) .....
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> (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.

Order 23 Rule 1, quoted above, provides that a plaintiff can withdraw a suit or abandon a part of his claim unconditionally. It creates a right in favour of the plaintiff to withdraw the suit, at any time, after its institution. Once the suit is withdrawn or any part of the suit is abandoned against all or any of the defendants, unconditionally, the plaintiff cannot bring a fresh suit on the same cause of action unless leave of the Court is obtained as provided by Order 23 Rule 1(3)(b).

In other words, a plaintiff cannot while unconditionally abandoning a suit or abandoning a part of his claim, reserve to himself the right to bring a fresh suit on the same cause of action. (See: Hulas Rai Baij Nath vs. K.P. Bass & Co., AIR 1968 SC 111 = 1967 (3) SCR

886).

The question in the present case is, however, a little different. If the suit has already been decreed or, for that matter, dismissed and a decree has been passed determining the rights of the parties to the suit, which is under challenge in an appeal, can the decree be destroyed by making an application for dismissing the suit as not pressed or unconditionally withdrawing the suit at the appellate stage. It is this question which is to be decided in this appeal.

Every suit, if it is not withdrawn or abandoned, ultimately results in a decree as defined in Section 2(2) of the Code of Civil Procedure. This definition, so far as it is relevant, is reproduced below:-

> "2(2). "decree" means the formal expression of an adjudication which, so far as ragards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be demmed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-
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> (a) any adjudication from which an appeal lies as an appeal from an order, or
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> (b) any order of dismissal for default.

Explanation.- A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final."

Thus a "decree" has to have the following essential elements, namely,

(i) There must have been an adjudication in a suit.

(ii) The adjudication must have determined the rights of the parties in respect of, or any of the matters in controversy.

(iii) Such determination must be a conclusive determination resulting in a formal expression of the adjudication. Once the matter in controversy has received judicial determination, the suit results in

a decree either in favour of the plaintiff or in favour of the defendant.

What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the Court which had passed it as in review, or by the Appellate or Revisional Court. Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings either in appeal or in revision have to be allowed to have a full trial on merits.

There is a consensus of judicial opinion amongst the High Courts on the question before us. We may begin by referring to an old decision of the Bombay High Court in Tukaram Mahadu Tandel vs. Ramchandra Mahadu Tandel & Ors., AIR 1925 Bombay 425 in which the Division Bench of that Court observed that though as a general proposition, a plaintiff can, at any time, withdraw a suit but where the parties have entered into a compromise and the defendant has acquired a right under the compromise, it would not be open to the plaintiff who had consented to the compromise, afterwards to annul its effect by withdrawing the suit under Order 23 Rule 1 read with Rule 3 thereof.

From Bombay, we may travel to Madras and refer to the decision of that High Court in Dharma Raja vs. K.M. Pethur Raja and others, AIR 1924 Madras 79. In this case, the plaintiff had obtained a decree against the defendants against which only one of the defendants had filed an appeal while the rest of them did not challenge that decree. At the appellate stage, the plaintiff-respondent wanted to withdraw the suit against the appealing defendant so that the decree which had already been passed against other defendnats who had not appealed, may be enjoyed by him. The High Court while rejecting the application of the plaintiff for withdrawal under Order 23 Rule 1 C.P.C. observed as under:-

> "The provision of law relied on by the plaintiffs- respondents in O 23, R.1 of the Code of Civil Procedure, which provides for the withdrawal of a suit by a plaintiff and abandonment of part of his claim. Thus the rule gives as a matter of right and it is not disputed that a similar privilege is inherent in an appellant as regards his appeal:
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> but we have not been referred to any ruling or provision of law which would extend this privilege to a plaintiff- respondent, nor can we see any reason why, when the litigation has reached the stage of an appeal, the respondent should be allowed the right to defeat the appeal and prevent its being heard by the simple process of withdrawing his suit as against the appellant. It may of course be argued that, although this is not a right of the appellant, nevertheless it is in the discretion of the Court to allow him to do so but that will depend on considerations which, we think, have not been appreciated by the lower appellate Court."

In Kedar Nath and others vs. Chandra Kiran and others, AIR 1962 Allahabad 263, permission to withdraw the suit at the stage of second appeal was refused. The Court observed that where the case is at the stage of second appeal and the trial court has given a finding of fact which is binding in second appeal, the Court should not deprive the party of the plea of res judicata by allowing the plaintiff to withdraw the suit at that stage.

This decision was considered by the Division Bench of the same High Court in Vidhydhar Dube and others vs. Har Charan and others, AIR 1971 Allahabad 41 and was approved. It was held that the right of the plaintiff to withdraw the suit at the appellate stage is not an absolute right but is subject to rights acquired by defendant under the decree. It was also observed that withdrawal may be permitted if no vested or substantive right of any party to the litigation is adversely affected. The decision of this Court in Hulas Rai Baij Nath vs. K.P. Bass & Co., AIR 1968 SC 111, was also considered and distinguished by observing as under:-

> "In that case the Court had to consider the right of a plaintiff to withdraw the suit before a decree came into existence and not after the decree had come into being. It was observed: "It is unnecessary for us to express any opinion as to whether a Court is bound to allow withdrawal of the suit of a plaintiff after some vested right may have accrued in the suit in favour of the defendant. On the facts of this case, it is clear that the right of the plaintiff to withdraw the suit was not at all affected by any vested right existing in favour of the appellant and, consequently, the order passed by the trial court was perfectly justified." In the present case, however, a right has become vested in the defendant after the decree in the suit had been passed."

Kedar Nath's case (supra) was followed in Kanhaiya and others vs. Mst. Dhaneshwari and another, AIR 1973 Allahabad 212, in which it was again laid down that the plaintiff does not have an unqualified or unfettered right under Order 23 Rule 1(1) C.P.C. to withdraw the suit at the appellate stage when rights have accrued to the respondents under the decree.

Both these decisions, namely, the decision of the Allahabad High Court in Kedar Nath's case and Kanhaiya's case were followed by the Andhra Pradesh High Court in Thakur Balaram Singh vs. K. Achuta Rao and others, 1977 (2) A.P.L.J. 111, and it was held that though the plaintiff has an absolute right to withdraw his suit before the passing of a decree under Order 23 Rule 1(1) C.P.C. but permission to withdraw the suit at the appellate stage would be refused if it would have the effect of prejudicing or depriving any right which became vested in the respondents or had accrued to them by reason of the findings recorded by the trial court. The Allahabad decisions, referred to above, were followed by the Rajasthan High Court in Ram Dhan vs. Jagat Prasad Sethi and others, AIR 1982 Rajasthan 235, and Kasliwal, J.(as he then was) held that if the withdrawal of the suit at the appellate stage would have the effect of destroying the rights which had come to be vested in the defendant-respondents, the suit would not be permitted to be withdrawn. It was also held that though the plaintiff has an unqualified right to withdraw the suit under Order 23 Rule 1(1) C.P.C., he cannot be allowed to do so at the appellate stage. It was observed that though it is right that the plaintiff would be precluded from bringing a fresh suit on the same subject matter, it could not be denied that the defendant would not be entitled to use the findings given in such a suit as res

judicata in subsequent proceedings. The same view was also expressed by the Punjab and Haryana High Court in Sh. Guru Maharaj Anahdpur Ashram Trust Guna vs. Chander Parkash and others, 1986 (1) 89 Punjab Law Reporter 319. The Court observed:-

> "Once the decree is passed by the trial court, certain rights are vested in the party in whose favour the suit is decided. Thus, the plaintiff is not entitled to withdraw the suit as a matter of course at any time after the decree is passed by the trial court. In these circumstances, the lower appellate court has acted illegally by allowing the plaintiffs to withdraw the suit after setting aside the judgment and decree of the trial court dismissing the suit."

In another Allahabad decision in Jutha Ram vs. Purni Devi and others, ILR 1970 (1) Allahabad 472, the plaintiff compromised the suit with certain defendants at the appellate stage and gave an application to withdraw the suit against those defendant-respondents. The Court refused permission to withdraw the suit as the withdrawal would have the effect of depriving the other respondents of the benefit of the lower courts' adjudication in their favour. This decision, incidentally, applies squarely to the facts of the present case as in this case also the plaintiff compromised with one of the respondents and gave an application for withdrawal of suit. Obviously, the intention was to deprive the appellants of the benefit which had accrued to them on account of a declaratory decree having been passed in favour of the plaintiff who incidentally was their predecessor-in- interest.

In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in parties to the suit under the decree cannot be taken away by withdrawal of suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.

The High Court also committed an error in not considering the impact of Rule 1-A which was inserted in Order 23 by the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976). This Rule provides as under:-

> "1-A. When transposition of defendants as plaintiffs may be permitted.- Where a suit is withdrawn or abandoned by a plaintiff under Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order I, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants."

The appellants before us, no doubt, had not applied before the High Court for being transposed as plaintiffs in place of the original plaintiff who had made an application for withdrawal of suit, but it cannot be overlooked that the plaintiff had transferred the property in suit in favour of the appellants, and, that too, after a declaration was given in his favour by the trial court that he was the owner of that property. It was thereafter that the appellants were impleaded as respondents in the appeal under Order 22 Rule 10 C.P.C. Once the property was transferred to the appellants and the

appellants were also impleaded as respondents in the appeal before the High Court, they were virtually in the position of the plaintiffs. Since they had purchased the property from the plaintiff after a declaration was given in his favour that he was the owner, a valuable right came to be vested in the appellants which could not be taken away by the plaintiff by withdrawal of the suit unconditionally as the withdrawal was positively to have the effect of destroying the decree already passed in favour of the plaintiff.

As a desperate bid to save the lost battle, learned counsel for plaintiff-respondent No. 1 contended that since the appellants had obtained the sale-deed by fraud, which would not have the effect of conveying any title to them, they cannot, in the matter of withdrawal of suit, intervene nor can they be heard to oppose withdrawal. We are not entering into the legality of the sale-deed as it is not the subject matter of the suit under appeal. Since appellants had already been impleaded as respondents in the appeal on the basis of that sale-deed, they have a right to be heard in the matter of withdrawal of suit.

For the reasons stated above, the appeals are allowed. The impugned judgment passed by the High Court is set aside, the application for withdrawal of suit is rejected and the appeals are remanded to the High Court for deciding it on merit in accordance with law. The parties shall bear their own cost.