
(1922) 09 MAD CK 0002
In the Madras High Court

Lakshmana Pillai alias Shanmugham Pillai and Another APPELLANT
Vs
Appalwar Alwar Ayyangar and Another RESPONDENT

Date of Decision : 13-09-1922

Acts Referred:

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

Citation : AIR 1923 Mad 246 : 71 Ind. Cas. 288 : (1923) 17 LW 632 : (1923) 44 MLJ 77

Hon'ble Judges : Oldfield, J

Bench : Division Bench

Judgement

Oldfield, J.—Plaintiffs, here respondents on 21-4-21 presented a petition withdrawing their suit. No order was passed on it at once. But on

the 29th July 1921 the 2nd plaintiff applied to withdraw from that withdrawal. The lower court in the order I am asked to revise has dismissed the

first of these applications as withdrawn and presumably intends to proceed with the trial.

2. The argument rejected by the lower court was generally that authority does not recognise a withdrawal from the withdrawal of a suit. On

general principles there does not seem to be any reason why withdrawal of a withdrawal should not be recognised, if always there is no question of

undue prejudice to any other party to the proceedingsArgument here has been based rather on what was implied in the argument before the lower

court that the original withdrawal must be regarded as terminating automatically the proceedings in the suit and involving the suit's immediate

dismissal; and that therefore at the time when the 2nd withdrawal petition was filed, there were no proceedings pending, on which it could operate

and there was no previous withdrawal petition undisposed of, of which it could

effect a withdrawal.

3. Order 23 rule I (1) of the present Code provides that after the institution of a suit the plaintiff may, as against all or any of the defendants,

withdraw his suit or abandon part of his claim and in Rule 1(3) there is provision for the plaintiff's liability for such costs as the court may award.

The existence of the second provision suggests that the withdrawal cannot be complete until the court has made its award as to costs. It is not

necessary, for reasons which will appear, to express a final opinion, on the question whether generally the plaintiff may withdraw his withdrawal at

any time before the decree, including the award of costs, is passed, in case, as may well happen, he prefers continuing the litigation to complying

with the court's order as to costs. Authority in the petitioner's favour consists in the Judgment in *Shamsher Bahadur v. Mahomed Ali* (1867) 2 Agr.

H. C. R. 158 but considerable doubt has been thrown on that decision by *Ram Bhurosi v. Gopi Beebee* (1874) 6 N. W. P. C. R. 66 . On the

other hand there is in favour of the respondents the judgment of Sundara Aiyar J in *Mukkammal v. Kalimuthu Pillai* (1912) M.W.N. 997 and

Rajkumari Debi v. Nrityakali Debi (1910) 12 CL. 434. Generally therefore I should hold that the lower Court's decision is correct.

4. In the present case however the question arose in a very limited way. For the plaintiff's withdrawal was in the following terms: "The suit is

withdrawn; it may be dismissed without costs." Mr. Ramachandra Aiyar on behalf of the petitioners has no doubt asked me to read this, as

expressing by the first sentence an unconditional withdrawal, the second sentence containing merely a suggestion as to costs which might or might

not receive effect. But the petition is not in my opinion capable of that construction. I can understand the plaintiffs as meaning only that the suit is

withdrawn on condition that it is dismissed without costs. This is material. For at the date of the petition, 21-3-21, the suit had been pending since

19-3-1920 and majority of the defendants had had notice and had appeared by vakils and some of them have filed written statements. In fact but

for the death of a defendant and the necessity for joining his legal representatives the issues would have already been framed. It is therefore clear

that an order, such as the plaintiffs proposed, dismissing the suit without an order as to costs, that is, without making the plaintiffs liable for the

costs of the defendants, would have been most unfair and, in fact, although Mr. Ramachandra Aiyar's clients the present petitioners, now say that they do not want costs, the 10th defendant's vakil pressed for them and it is possible that other defendants also would have done so. Taking the withdrawal petition as conditional on the passing of an order regarding costs to the effect specified in it, I must hold that, unless and until the Court signified its intention to pass such an order, the petition could not operate as a termination of the suit. That being so and the suit still being pending on the date of the petition withdrawing the withdrawal, there was no obstacle to the lower Court in the exercise of its discretion, dealing with the latter petition and dismissing the former and continuing the trial. No ground for revision has been made out. The revision petition therefore must be dismissed with costs.