
(2011) 11 CHH CK 0067
In the Chhattisgarh High Court
Case No : First Appeal No. 148 of 2007

M/s Sadhulal Shrikishan

APPELLANT

Vs

Shri Radheshyam Bansal

RESPONDENT

Date of Decision : 25-11-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 96

Citation : (2012) 1 CGBCLJ 124 : (2012) 1 MPHT 73

Hon'ble Judges : I.M. Quddusi, J;Gulam Minhajuddin, J

Bench : Full Bench

Advocate : Ravish Agarwal and Mr. Sanjay S. Agarwal, for the Appellant;
Saytabhan Agarwal and Mr. Avinash Mishra, for the Respondent

Final Decision : Dismissed

Judgement

I.M. Quddusi, J.—By this order the application for dismissal of appeal, filed by the respondent, dated 22-11-2011 is being decided. The instant appeal has been filed by the plaintiff/appellant on 19-11-2007 challenging the impugned judgment and decree dated 10-8-2007, passed by the 9th Additional District Judge (FTC), Raipur in Civil Suit No. 8-13/2004 (M/s Sadhu Lal Shri Kishan Vs. Shri Radheshyam Bansal), dismissing the suit.

2. During the pendency of the appeal an application dated 23-4-2010 (I.A. No. 1) was filed by the appellant for withdrawal of the appeal. Thereafter, during the pendency of the appeal and the application (I.A. No. 1). a subsequent application dated 26-4-2010 (I.A. No. 2) was filed by the appellant for withdrawal of the application dated 23-4-2010, which was filed for withdrawal of the appeal.

3. The respondent has filed the instant application for dismissal of the appeal on the ground that the application (I.A. No. 1) for withdrawal of the appeal was filed by the appellant on 23-4-2010 and the appellant should not have been permitted to withdraw the application for withdrawal of the appeal subsequently, by filing another application (I.A. No. 2), dated 26-4-2010 for withdrawal of the I.A. No.

1, i.e., application for withdrawal of appeal, because by filing the I.A. No. 1 the appeal should be deemed to have been withdrawn.

4. We have heard learned Counsel for the parties and perused the records.

5. Brief facts, in nutshell, are that the appellant has filed this appeal on 19-11-2007 u/s 96 of the CPC challenging the impugned judgment and decree. The same was admitted and notices were issued to the respondent as per rules, vide order dated 21-11-2007. Thereafter, I.A. No. 1 was filed on 23-4-2010 for withdrawal of the appeal with the prayer "It is therefore, prayed that the Hon"ble Court may kindly be pleased to permit the appellant for the withdrawal of his appeal, in the interest of justice". Before this application could be listed for hearing, another application (I.A. No. 2) was filed on 26/4-2010 with the following prayer "It is therefore, prayed that the Hon"ble Court may kindly be pleased to permit the appellant for the withdrawal of his application dated 23-4-2010, in the interest of justice".

6. On 27-4-2010 the I.A. No. 2 was allowed and consequently the I.A. No. 1 was dismissed as withdrawn. The order dated 27-4-2010 is reproduced as under:-

DB : Hon"ble Shri T.P. Sharma & Hon"ble Shri R.L. Jhanwar, JJ.

27-4-2010

Shri S.S. Agarwal for the appellant.

Shri Brajesh Mishra, Counsel for the respondent.

Heard on I.A. No. 2 for withdrawal of I.A. No. 1 for withdrawal of appeal.

For the reasons mentioned in the application, I.A. No. 2 is allowed.

Consequently, I.A. No. 1 is dismissed as withdrawn.

Call for the record.

List it on 9-7-2010.

7. Learned Counsel for the respondent/applicant has submitted that there was no need to seek permission of the Court to withdraw the appeal since the application for withdrawal of the appeal was filed, the appeal should have been treated as deemed to be withdrawn and only a formal order of the Court was required to be passed as "the appeal is dismissed as withdrawn". The application for withdrawal of that application (I.A. No. 1), which was filed for Withdrawal of the appeal subsequently, was not maintainable at all and therefore, the appeal should be dismissed as withdrawn, ignoring the application (I.A. No. 2) for withdrawal of the earlier application (I.A. No. 1). In support of his submissions learned Counsel for the appellant relied on the decision of a Division Bench of Allahabad High Court in Smt. Raisa Sultana Begam and Others Vs. Abdul Qadir and Others, in which the Court has held that application for withdrawal of suit cannot be withdrawn even before order is passed thereon. Since withdrawing a suit is a

unilateral act to be done by the plaintiff, it requires no permission or order of the Court and is not subject to any condition; it becomes effective as soon as it is done just as a compromise does. Any information of it given to the Court is no part of it. so also any order passed by the Court on receiving the information.

8. Learned Counsel for the appellant has cited two case laws of Hon''ble Apex Court, the first one is Jet Ply Wood Private Ltd. and Another Vs. Madhukar Nowlakha and Others, . the relevant Paragraphs are 23 to 26, which are quoted as under :-

23. As indicated hereinbefore, the only point which falls for our consideration in these appeals is whether the Trial Court was entitled in law to recall the order by which it had allowed the plaintiff to withdraw his suit.

24. From the order of the learned Civil Judge (Senior Division) 9th Court at Alipore, it is clear that he had no intention of granting any leave for filing of a fresh suit on the same cause of action while allowing the plaintiff to withdraw his suit. That does not, however, mean that bypassing such an order the learned Court divested itself of its inherent power to recall its said order, which fact is also evident from the order itself which indicates that the Court did not find any scope to exercise its inherent powers u/s 151 of the CPC for recalling the order passed by it earlier. In the circumstances set out in the order of 24th September, 2004, the learned Trial Court felt that no case had been made out to recall the order which had been made at the instance of the plaintiff himself. It was, therefore, not a question of lack of jurisdiction but the conscious decision of the Court not to exercise such jurisdiction in favour of the plaintiff.

25. The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4th February, 2005 though the language used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14th March, 2005, in which reference has been made to a Bench decision of the Calcutta High Court in the case of Ramesar Sarkar (supra) which, in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the CPC providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the CPC can be resorted to in the interest of justice. The principle is well established that when the CPC is silent regarding a procedural aspect, the inherent power of the Court can come to its aid to act ex debito justitiae for doing real and substantial justice between the parties. This Court had occasion to observe in the case of Manohar Lal Chopra Vs. Rai Bahadur Rao Raja Seth Hiralal, , as follows :-

It is well settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them.

26. Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameswar Sarkar's case, allowed the application for withdrawal of the suit in exercise of inherent powers u/s 151 of the Code of Civil Procedure, upon holding that when through mistake the plaintiff and withdrawn the suit, the Court would not be powerless to set aside the order permitting withdrawal of the suit.

9. The other case cited by learned Counsel for the appellant is Rajendra Prasad Gupta Vs. Prakash Chandra Mishra and others, (2011) 2 SCC 705, the relevant Paragraphs 2 to 7 are quoted as under :-

2. This appeal by special leave, has been filed against the impugned judgment of the High Court of Allahabad dated 6-2-2004 passed in FAFO No. 2103 of 2003. It appears that the appellant was the plaintiff in Suit No. 1301 of 1997 before the Court of the Civil Judge (Junior Division), Varanasi, He filed an application to withdraw the said suit. Subsequently, it appears that he changed his mind and before an order could be passed in the withdrawal application he filed an application praying for withdrawal of the earlier withdrawal application. The second application had been dismissed and that order was upheld by the High Court. Hence, this appeal by special leave.

3. The High Court was of the view that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without any order on the withdrawal application. Hence, the second application was not maintainable.

4. We do not agree. Rules of procedure are handmaids of justice. Section 151 of the CPC gives inherent powers to the Court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the Court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application.

5. In Narsingh Das Vs. Mangal Dubey. Mahmood, J. the celebrated Judge of the Allahabad High Court, observed :-

Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law. As a matter of general principle prohibition cannot be presumed.

6. The above view was followed by a Full Bench of the Allahabad High Court in Raj Narain Saxena Vs. Bhim Sen and we agree with this view. Accordingly, we are of the opinion that the application praying for withdrawal of the withdrawal application was maintainable. We order accordingly.

7. In the result, the impugned judgment of the High Court is set aside and the appeal is allowed. No costs. The suit shall proceed and to be decided on merits, expeditiously.

10. In view of what has been discussed above, we are of the opinion that in the instant case when the application (I.A. No. 1) for withdrawal of the appeal was moved and subsequently, the application (I.A. No. 2) for withdrawal of that application was moved and both the applications were taken together for hearing and the application I.A. No. 2 was allowed, whereas the I.A. No. 1 was dismissed as withdrawn; it was done under the inherent powers of this Court u/s 151 of the Code of Civil Procedure. There is no bar in the CPC to pass an order to allow the application to be dismissed as not pressed. Where there is no specific bar in the Code of Civil Procedure, the powers u/s 151 of the CPC can be used by the Court to secure the ends of justice.

11. Learned Counsel for the appellant has also submitted that the principle of res judicata applies between two stages in the same litigation to the extent that a Court, whether the Trial Court or a Higher Court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings. In this regard, he has relied upon the case law of Hon"ble Supreme Court laid down in Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, .

12. In view of the facts and circumstances mentioned above, the application for dismissal of the appeal, filed by the respondent, has no force and the same is rejected. On the joint request of learned Counsel for the parties list the appeal for hearing on 17th February, 2012.