

(1926) 09 BOM CK 0010
In the Bombay High Court
Case No : First Appeal No. 436 of 1925

Nilappagouda Goudappgouda

APPELLANT

Vs

Basangouda Sangangowda

RESPONDENT

Date of Decision : 24-09-1926

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : AIR 1927 Bom 244 : (1927) 29 BOMLR 299 : 101 Ind. Cas. 348

Hon'ble Judges : Shah, J;Fawcett, J

Bench : Division Bench

Judgement

Shah, J.—This is an application by appellant No. 6 to withdraw from the appeal. There are other appellants Nos. 1 to 5 with whom he had joined in presenting this appeal. The application is opposed by the learned pleader for appellants Nos. 1 to 5 on the ground that under Order XXIII, Rule 1, the Court cannot allow a co-plaintiff to withdraw without the consent of the other plaintiffs. Under Sub-rule (1), however, it is open to the plaintiff against all or any of the defendants to withdraw his suit or abandon part of his claim. When the particular appellant wants to withdraw, it seems to me that it is open to him to do so. Having regard to the circumstances of the case, the Court may make a suitable order with a view to see that by his withdrawal the other appellants are not unfairly prejudiced. But I am unable to accept the contention urged by Mr. Desai that Sub-rule (4) governs Sub-rule (1), and that without the consent of the coappellants he cannot withdraw the appeal. It seems to me that the authorization of the Court contemplated by that sub-rule refers to the permission of the Court which is contemplated by Sub-rule (2) allowing the plaintiffs or any of them to withdraw from the suit with liberty to institute a fresh suit. Subrule (3) appears to me to make this position clear. It may be mentioned that under the old Code, with reference to Section 373 it had been held that the consent of the co-plaintiffs was not necessary to enable a plaintiff to withdraw the suit, but that such consent was necessary when he wanted to withdraw from the suit with the permission of the Court to file a fresh suit. See Mohamaya Chowdhrair v. Durga

Churn Shaha. (1881) 9 C.L.R. 332The addition of Sub-rule (1) and the re-arrangement of that Section 373 in the present Rule 1 do not alter the position on this point. I am, therefore, of opinion that it is not open to the Court to disallow the present application on the ground that the consent of the o-appellants is not forthcoming.

2. In view, however, of the facts of this case, it is clear to my mind that the appellant No. 6 who wants to withdraw should be allowed to be joined as a respondent by the remaining appellants. No further notice of the appeal to him will be necessary in view of the fact that this order is made in the presence of his pleader.

3. I would, therefore, allow appellant No. 6 to withdraw from the appeal and direct that he be joined as a respondent in view of the position which he has now taken.

Fawcett, J.

4. I think that, supposing that the question of the withdrawal of the appellant No. 6 is within the discretion of the Court, there is no sufficient reason for our not permitting him to withdraw, so far as his interest in the appeal is concerned, and that being so, I do not think that it is essential to consider fully the question whether Sub-rule (4) of Rule 1 of Order XXIII governs an application by a co-plaintiff to withdraw his suit or abandon part of his claim, without liberty to institute a fresh suit for the subject-matter of the suit or part of his claim. I admit that there are substantial reasons in favour of the view taken by my learned brother that that sub-rule only governs cases of the kind mentioned in Sub-rule (2). But on the other hand I think it is open to question whether, apart from Sub-rule (4), the Court has not power to control a co-plaintiff who desires to withdraw from a suit, if this will operate to the prejudice of his co-plaintiffs. It may be that for that purpose recourse will have to be had to Section 151 of the CPC or some other power. Thus, in England, with regard to the provisions of Order XXVI, Rule 1, it has been held that one of several co-plaintiffs has no absolute right to withdraw from an action as a matter of course: vide, *In re Mathews. Oates v. Mooney*. [1905] 2 Ch. 460 Similarly, in a Bengal case, *Jogendra Narayan Singha and Others Vs. Mohamed Ismail Chaudhury and Others*, where all the landlords concerned had to join in suing for enhancement of rent, the Court refused to permit one of these landlords to withdraw and so wreck the suit.

5. I wish to reserve full discretion to consider that point, should it arise hereafter.