
(1997) 07 AHC CK 0216

In the Allahabad High Court

Case No : Civil Miscellaneous Application A and 12 of 1996 in Original Suit No. 127 of 1994

Ram Chandra Mission and Others

APPELLANT

Vs

Umesh Chandra Saxena and Others

RESPONDENT

Date of Decision : 10-07-1997

Acts Referred:

Civil Procedure Code Amendment Act, 1973 — Order 23 Rule 1, Order 23 Rule 1(1), Order 23 Rule 1(2), Order 23 Rule 1(3), 80

Citation : (1997) AWC 378 Supp : (1998) RD 323

Hon'ble Judges : A.K. Banerji, J

Bench : Single Bench

Advocate : Ajeet Kumar, for the Appellant; B.B. Paul, R.N. Pandey, B.K. Upadhyaya, R.C. Upadhyaya and Km. Usha Kiran, for the Respondent

Final Decision : Allowed

Judgement

A.K. Banerji, J.—By means of the aforesaid application A-12, the Plaintiff-Appellants have sought permission to withdraw their Suit No. 127 of 1994 with permission to file a fresh suit, if occasion arises.

2. Briefly stated, the relevant facts are that the Plaintiff Sri Ram Chandra Mission through its President Sri P. Rajagopalachari and four others filed the Original Suit No. 127 of 1994 in the court of the Civil Judge, Shahjahanpur, inter alia for permanent injunction against the Defendant Nos. 1 to 8 restraining them and their representative, agents and servants from holding any function in the name of the President or the other office bearers of Sri Ram Chandra Mission, Shahjahanpur and further restraining the Defendants from collecting any money in the name of Sri Ram Chandra Mission, Shahjahanpur and from operating or opening any bank account in the name of the said mission. The said suit has subsequently been transferred to this Court and is pending adjudication. Defendant No. 1 has filed a written statement in the said suit and issued have been framed therein. At this stage and before evidence could be recorded, the

present application has been filed under Order XXIII, Rule 1, C.P.C., on behalf of the Plaintiffs through their counsel for withdrawing of the said suit with permission to file a fresh suit if occasion arises. The prayer made in this application is being opposed by Sri U. C. Saxena and Defendant No. 1 who has filed a counter-affidavit to the same.

3. I have heard Sri Ajit Kumar, for the Plaintiffs and Sri. B. B. Paul, for the Defendant No. 1. Learned Counsel for the Plaintiff-applicants has placed before me the affidavit filed in support of the withdrawal application and has mainly contended, that in view of certain subsequent developments which has taken place particularly the judgment of this Court dated 16.10.1995 in Testamentary Suit No. 1 of 1994 and a fresh Suit No. 697 of 1995 filed by the Defendant No. 1 in the court of Civil Judge, Allahabad and the intention of the Defendant to involve the Plaintiffs in multifarious litigation, present application for withdrawal of the suit with the permission to institute a fresh suit if occasion arises has become necessary. That apart Suit No. 127 of 1994 related to the function to be held at Shahjahanpur between 25.4.1995 to 1.5.1995 which the Defendant No. 1 was trying to hold illegally and the said period having expired, the suit has since become infructuous and against some of the Defendants cause does not subsist any more. Besides certain orders have been passed by the Registrar of Societies on 5.4.1994 and 29.9.1994 in favour of the Plaintiffs and though the Registrar of Societies have been arrayed as Defendant No. 9 notice u/s 80 of C.P.C., have not been given to the said Defendant, which might be a formal defect for the said reason also and to avoid multiplicity of proceedings and conflicting judgments withdrawal of the suit permission to institute another suit if the occasion arises has become necessary.

4. On the other, hand the learned Counsel for the Defendant No, 1 has mainly contended that the application for withdrawal does not disclose on behalf of which of the Plaintiff the same is being filed. Secondly the Original Suit No. 127 of 1994 was filed illegally for mala fide reasons by the alleged power of attorney holder of P. Rajagopalachari without obtaining permission from the Defendant No. 1 who is the President of Sri Ram Chandra Mission, consequently, the said suit deserves to be dismissed. Thirdly no notice u/s 80, C.P.C., was necessary to Defendant No. 9 hence the suit does not suffer from any formal defect. Fourthly, the decision of this Court dated 16.10.1995 in Testamentary Suit No. 1 of 1994 is under challenge in Special Appeal No. 829 of 1995 and, therefore, there does not exist any sufficient cause to permit the Plaintiffs liberty to file a fresh suit. The application. therefore, deserves to be dismissed.

5. I have carefully considered the submission made by the learned Counsel for the parties. Order XXIII, Rule 1, C.P.C., permits withdrawal of suit or abandonment of part of claim. It says that at any time after the institution of a suit, the Plaintiffs may as against all or any of the Defendants abandon it suit or a part of the claim. Rule (3) of Rule 1 of Order XXIII lays down as follows:

(3) Where the Court is satisfied:

(a) that a suit must fail by reason of some formal defect, or

(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 the said suit or such part of the claim.

6. It is evident from the provisions of Order XXIII, Rule 1 that the Plaintiff has an absolute right of withdrawal though such liberty given to the Plaintiff is hedged with certain consequences set out in Sub-rule (3). It is only if he wishes to escape those consequences, that he is required to obtain permission of the court for filing a fresh suit. The court hearing an application under Sub-rule (2) has to exercise its Judicial discretion justifying the grant of permission to withdraw with liberty to file a fresh suit. In the case of *Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co.*, where the Plaintiff had filed a suit for accounting and subsequently prayed for withdrawal of the same without claiming liberty for filing a fresh suit and there being no preliminary decree passed by the Court or any set off or counter claim, the Supreme Court held that there was no provision in the CPC which requires the court to refuse permission to withdraw the suit and compel the Plaintiff to proceed with it. It is evident, therefore, that had the application by the Plaintiff being simplicitor for withdrawal of the suit, there would be no difficulty in granting the permission to withdraw the same, in the facts and circumstances of the present case, and in the light of observations made by the Supreme Court in the case of *Hulas Rai Baijnath (supra)*. The prayer, however, made by the Plaintiff is being opposed because liberty has been sought to file a fresh suit if necessary. It is noteworthy that the law is well settled that the prayer made in this application cannot be split up inasmuch as part of the prayer for withdrawal of the suit is granted and the part where permission is being sought for filing a fresh suit, rejected. A Division Bench of this Court in the case of *Bharat and Others Vs. Ram Pratap and Others*, while approving the view of the learned single Judge in the case of *Balbir Singh v. Smt. Sulochana Devi* 1970 All 382, had held that where an application contained a composite prayer to the effect that the Plaintiff be permitted to withdraw the suit with liberty to file a fresh suit, the Court has either to accept the said prayer or reject the same in toto. It has no jurisdiction to pass an order by splitting up the prayer contained in an application moved under Order XXIII, Rule 1 (2) of the Code. Similar view has been taken by other High Courts as well see *Wazir Singh Chhela Blaka Baba Mulangah Shah Vs. Hidayat Shah Shrida*, ; *Devidas Tulsiram Brijwani Vs. The Commissioner, Poona Municipal Corporation*, and *Hans Raj Akrot Vs. State of Himachal Pradesh*, ,

7. The question, therefore, which arises now is whether to allow the Plaintiffs application in toto meaning thereby whether the Plaintiff can be permitted to withdraw the suit with a liberty to file a fresh suit on the same cause of action or on a different cause of action if the occasion arises. It will not be out of place to

mention here that so far as filing a fresh suit on different cause of action is concerned, there is no bar to the same even if permission is not sought. In this backdrop it has to be seen whether there are sufficient grounds for allowing the Plaintiff to institute a fresh suit. Sri Ajit Kumar, learned Counsel for the applicants has contended that in the said suit, the Assistant Registrar of Firms Society and Chits has been impleaded as Defendant No. 9. No notice u/s 80, C.P.C. to the said Defendant was given therefore to save the suit from a formal defect withdrawal of the same be permitted with liberty to file a fresh suit. The Defendants have however, stated in their counter-affidavit that no notice u/s 80, C.P.C. was necessary inasmuch as the State of U.P. was not at all a party in the said suit. Section 80, C.P.C. lays down that no suit against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity shall be filed until the expiration of two months next after notice in writing has been delivered or left at the concerned office. It cannot be disputed that the Defendant No. 9 is a public officer. For that reason a notice u/s 80, C.P.C. may be required to be given to the said public officer. Though it appears that no relief has been claimed against the said Defendant in the suit, yet even if the public officer is only a proforma Defendant, notice u/s 80, C.P.C, will be necessary as held in the case of Union of India, Railway Administration, Madras and Others Vs. Eastern Match Co., Tirumangalam, . Similarly, it has been held in the case of Certificate Officer and Another Vs. Kasturi Chand Malu and Another, , and in the case of Smt. Shima Sundari Lekri Vs. Paltu Hemram and Others, , that want of notice u/s 80, C.P.C, is a technical defect, therefore, permission for withdrawal of suit for serving notice u/s 80, C.P.C, can be granted under Order XXIII, Rule 1, C.P.C.

8. That apart, from a perusal of the plaint of the aforesaid suit and the relief claimed therein, it would appear that the main cause, of action for filing the said suit arose, as the Plaintiffs were alleging that the Defendant No. 1 was illegally trying to hold a function of Shri Ram Chandra Mission, Shahjahanpur of which he had no authority as he was neither the President nor the office bearer in the said Mission. A relief was, therefore, sought against the said Defendant from holding the function and from realising funds for holding the said function and opening bank account or operating the same. Admittedly, the said function was to be held between the period 29.4.1994 to 1.5.1995. which has since expired. It does, therefore, appear that the main relief which had been sought no longer subsists. However, as contended by the learned Counsel, it is evident from the pleadings of the parties that they are litigating since long and a number of suits had been filed in different courts some of which are still pending and the rights of the parties have not yet been finally adjudicated, therefore, if the said suit is permitted to be withdrawn as infructuous without liberty to file a fresh suit, in case subsequently, a similar occasion arose and the Plaintiff was required to file any suit, a technical objection could be raised that the same was barred by res-judicata. Without expressing any opinion on merits of the said objection, to avoid multiplicity of proceedings and conflicting orders, the Court could exercise its

judicial discretion and give liberty to the Plaintiffs to file a fresh suit, if the same became necessary.

9. Shri Paul, learned Counsel for the Defendant No. 1 has, however, strongly contended that the present application is mala fide as the suit has reached evidence stage and the Plaintiffs want to withdraw the suit and file a fresh suit against the Defendant for harassing them. I am unable to find any mala fide on the part of the Plaintiffs. It is noteworthy that in the suit, only issues have been framed and even the evidence has not been recorded. Therefore, till date no rights have yet vested in the Defendant. The position could have been different had evidence been recorded or the matter was being heard and at that stage, the application had been moved. Supreme Court in the case of Beniram and Others Vs. Gaiind and Others, , permitted the Plaintiff-applicants to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action having considered the fact that non-pleadings of a point in the plaint may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made. Our Court in the case of Kamta and Another Vs. Gaya Prasad and Others, , observed that the provisions of Order XXIII, Rule 1 (1) confers an unqualified right on the Plaintiffs to withdraw from the suit even at the stage of an appeal.

10. Sri Paul has also contended that the application cannot be allowed as it has not been mentioned therein whether all the Plaintiffs have joined in the prayer for withdrawing the said suit. The application has been filed on behalf of the Plaintiffs, by their counsel, Shri Ajit Kumar, and the vakalatnama in his favour by all the Plaintiff is on record. It is well established that vakalatnama or authority given to a counsel to do all necessary acts in connection with the suit will include also an authority to withdraw a suit under Order XXIII, Rule 1, C.P.C.; see 1988 All 450. I, therefore, do not find any force in the said submission.

11. Having given my anxious consideration to the matter, I am of the view that sufficient ground has been made out to withdraw the present suit with liberty to file a fresh suit on the same cause of action or on a different cause of action if necessity arises. However, as this case is pending for some time before this Court and the Defendant is represented and has filed a written statement, it would be appropriate to direct that the permission is granted to withdraw the suit with liberty to file a fresh suit if necessary subject to the payment of Rs. 2,000 as costs to be paid to the Defendant No. 1 within a period of one month.

12. Consequently, the application A-12 is allowed with the observations made above.