

(1975) 01 BOM CK 0021

In the Bombay High Court

Case No : Civil Revision Application No. 501 of 1974

Vasantrao Dattaji Dhanwate and another	APPELLANT
Vs	
Shyamrao Dattaji Dhanwate and others	RESPONDENT

Date of Decision : 22-01-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 23 Rule 1

Citation : (1975) MhLj 337

Hon'ble Judges : A.R. Shimpi, J

Bench : Single Bench

Advocate : J.P. Pendsey, for the Appellant; S.G. Ghate and N.M. Thaore, for the Respondent

Final Decision : Allowed

Judgement

A.R. Shimpi, J.—The two plaintiffs who Are applicants in this revision application challenged the order passed by the Civil Judge, Senior Division, Nagpur, on Exhibits Nos. 81 and 83 in Special Civil Suit No 9 of 1974 by which the learned Judge allowed the request of defendants to transpose them as plaintiffs and plaintiffs as defendants in the suit under Order 1, rule 10 of the Civil Procedure Code, though he did not specifically state but he also granted the application of the applicants for not prosecuting the suit which they had filed.

2. The facts in brief which gave rise to this litigation are as under :-

Plaintiffs Nos. 1 and 2 and defendants Nos. 1 to 6 are partners of a firm Shivraj Fine Arts Liiho Works, Nagpur. The said firm is duly registered under the provisions of the Indian Partnership Act carrying on the business both at Nagpur and Bombay. Plaintiffs who are the applicants held four annas share in the partnership whereas the defendants who are opponents in this revision application collectively held 12 annas share. There were several partnership deeds but the last partnership deed executed between the parties is dated 1-4-1971 and it is not disputed that under that deed it is provided That the

duration of the partnership was at will. It appears that the relations between the Plaintiff and defendants were not cordial. Hence plaintiffs decided to put an end to; the partnership and, therefore, they had given a notice of dissolution dated 5-1-1974. By that notice they intimated their intention to dissolve the firm and the dissolution to come into effect from the midnight of 9-1-1974.

3. The plaintiffs immediately after giving this notice on 10-1-1974 filed a suit for claiming accounts of the dissolved firm from defendants who held 12 annas share in the partnership. It appears that along with the plaint an application for appointment of a receiver was made and with the consent of the parties a receiver came to be appointed the assets of partnership firm on 20-3-1974. It appears that the receiver was directed to file his proposals for effectively winding up the partnership in the best interest of all the partners and I am told that on 24-4-1974 he submitted his proposals which are at Exhibit 57. I am told at the Bar that the business was run by the members of the family and, therefore, by reply Exh. 73 defendants stated that if the business was to be kept in the family then the parties namely plaintiffs and defendants should be allowed to bid in the auction and the highest bidder amongst them should take the assets of the partnership.

4. On 6-7-1974 applicants/plaintiffs gave a purshis Exh. 81 that they wanted to withdraw the suit. This purshis appears to have been not acted upon that day and no order was passed on it. On 10-7-1974 the respondents i. e. the defendants in the suit filed an application under Order I, rule 10 of the CPC which is at Exh. 83 by which they prayed that this being a suit for dissolution of partnership and its accounts, the defendants should be transposed as plaintiffs and plaintiffs should be transposed as defendants and the suit be continued. They claimed thus wholesale transposition of the parties in the suit. On 12-7-1974 the present plaintiffs filed a fresh application before the trial Court contending that the trial Court should not consider the application made by the defendants under Order 1, rule 10 of the CPC at Exh. 83 because the Court ceased to have jurisdiction over the suit immediately after plaintiffs passed a purshis at Exh. 81 on 6-7-1974 that they wanted to withdraw the suit. The suit was adjourned for hearing the arguments to 19-7-1974 Thereafter plaintiffs filed another application on 19- 7-1974 reiterating what they had stated. The learned Judge heard both the Advocates of the plaintiffs and defendants and passed the order accepting the request of the defendants for transposition of the defendants as plaintiffs. The learned Judge has also stated in the order that as the defendants were getting benefit of the court-fees stamp which has been paid by the plaintiffs no costs were awarded to them against the plaintiffs in an application made by them as well as in the application filed by the plaintiffs at Exhibit 81 for withdrawing the suit. One fact was emphasised before me and it needs be stated that till the purshis Exh. 81 was filed by the plaintiff, the defendant had not filed their written statement. Therefore, the suit had not proceeded according to plaintiffs beyond the appearance of the defendants and Certain interlocutory applications made by the parties.

5. This order passed by the learned Judge is being challenged in this revision application by the plaintiffs on the ground that the Court had no jurisdiction to pass any order in the suit after plaintiffs had filed a purshis that they wanted to withdraw the suit. It was submitted by Shri Pendse that the order allowing an application of the defendants by the learned Judge was an error in the exercise of jurisdiction. It was an illegal exercise and assumption of jurisdiction when the Court ceased to have jurisdiction over the suit. In support, Shri Pendse has relied upon the observations reported in Yeshwant Govardhan Vs. Totaram Avasu and Others, Nathu and Others Vs. State of Gujarat and Others, Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co., and Allu Appalaswamy and Others Vs. Maturi Anjaneyulu and Others, Shri Pendse urged that these authorities lay down a proposition that the plaintiff has an unqualified and unconditional right to withdraw the suit filed by him and once plaintiff exercises that right then the Court cannot take any action in such a suit, and the Court cannot pass any further orders in favour of the defendants. Shri Pendse submitted that the only order that could be passed by the Court was as regards the costs in the suit. He submitted that the order the learned Judge has passed in the suit is not an order regarding the costs but it is an order passed under Order 1, rule 10 of the CPC which the learned Judge was not competent to pass because the suit was already withdrawn by the purshis and he had no jurisdiction over the suit. Shri Pendse urged that the learned Judge has relied upon the observations of a case reported in Devsey Khetsey Vs. Hirji Khairaj, but that case was not applicable to the facts of the present case: In that case, plaintiff had died and then an application was made by one of the defendants under Order 1, rule 10 of the CPC to transpose the defendants as plaintiffs and the heirs of the plaintiffs as defendants. He submitted that in that case the question of plaintiff's withdrawing the suit did not arise. As against this, Shri Ghate, the learned Advocate for the defendants/respondents supported the judgment of the trial Court and he has relied upon the decision reported in Devsey Khairaj v. Hirji Khairaj and also a decision of this Court reported in Edulji Muncherji Wacha v. Vullebhoj Kuanbhoy 7 I L R 167 (Bom.) as well as the two Division Bench rulings; one of the Madras High Court reported in Seethai Achi Vs. Meyappa Chettiar and Others, and the another of the Allahabad High Court reported in Mt. Jaimala Kunwar and Another Vs. Collector of Saharanpur and Others

6. I have already given the facts material for our purpose for disposing of this revision application. I have also summarised the contentions urged before me by Shri Pendse. In order to appreciate the submissions it is necessary to refer to the authorities canvassed by Shri Pendse and to find out whether they go to support his contention that as soon as an application or a purshis is made by the plaintiffs under Order 23, Rule 1 of the CPC the Court ceases to have jurisdiction over the suit and the Court cannot pass any further orders besides the order of costs. Order 23, Rule 1 of the CPC lays down :-

"Any time 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."

Sub-rule (1) of Order 23 of the CPC clearly goes to show that plaintiff has a right as against any of the defendants or all defendants to withdraw his suit at any time. However, sub-rule (3) of Order 23 states:-

"Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

Reading these two clauses together, it clearly shows that though the plaintiff has a right to withdraw from the suit or to withdraw a portion of his claim against any of the defendants or against all defendants still as soon as the petition is filed, it cannot be said that the Court loses its jurisdiction over the suit and the Court cannot pass any further orders in that suit because the effective withdrawal would be after the Court passes an order under sub-rule (3) in respect of costs and. in the instant case I find that though the petition WAS given on 6-7-1974 no orders were passed on that day but the proceedings continued and an application has been given by the defendants during the pendency of the suit on 10-7-1974. Till then there was no effective withdrawal of the suit by the plaintiffs because the Court had not passed any order on the petition or as regards the payment of the costs. The authority Shri Pendse has relied to submit that the plaintiff has an unqualified and unconditional right to withdraw the suit, of our High Court reported in Yeshwant Govardhan v. Totaram Avasu in paragraph 7 clearly shows that the true position in such a case when a petition is given to withdraw from the suit is that withdrawal would become effective by an order of the Court. The following observations are made by the Division Bench in paragraph 7:-

"If, therefore, the plaintiff has a right to withdraw his suit, he has, equally, a right to withdraw his withdrawal and so long as the Court has not made an order, showing that the withdrawal has become complete or effective, there is always a locus paenitentiae for the plaintiff to withdraw his withdrawal, In so holding, there is no injustice to the defendant. If the defendant cannot compel a plaintiff to continue his suit, the defendant cannot, equally, compel a plaintiff not to withdraw his withdrawal. We think, therefore, that, in law, the true position is that it is open to a plaintiff to withdraw his application for withdrawal of suit, so long as the withdrawal has not become effective by an order of the Court."

These observations, in my opinion, go to show that the withdrawal would become effective by an order of the Court till then the suit would be said to be pending. The other authority submitted by Shri Pendse is of the Gujarat High Court reported in Nathu v. State. It is a ruling by a Single Judge and it lays down that as the suit was withdrawn unconditionally, permission of the Court in fact, was not necessary. The facts of that case show that plaintiff No. 1 was a lunatic and he was represented by plaintiff No. 2 as his guardian. Plaintiff No. 2 withdrew the suit by a petition and the contention was raised that plaintiff No. 2 could not withdraw the suit unless the Court was satisfied that the withdrawal of the suit was in the interest of the lunatic and the provisions of Order 32, Rule 7 of the

CPC were pressed on behalf of the defendants. In my opinion, this case has no bearing to the facts of the present case. Only it goes to show that the plaintiff has a right to withdraw the suit but as I have stated from the observations of the case decided by our High Court it is clear that the withdrawal would be effective after the Court passed the order. Shri Pendse relied upon a decision of the Supreme Court reported in M/s. Hulas Rai v K. B. Bass, The facts of that case show that a suit was brought by the principal against his agent for rendition of accounts and when the suit was at the stage of hearing after the framing of the issues and when no preliminary decree for rendition of accounts was passed plaintiff withdrew the suit and that was objected. His Lordship Bhargava J. who has spoken for the Bench has observed in paragraph No. 2 as follows :-

"The short question that, in these circumstances, falls for decision is whether the respondent was entitled to withdraw from the suit and have it dismissed by the application dated 5th May, 1953 at the stage when issues had been framed and some evidence had been recorded, but no preliminary decree for rendition of accounts had yet been passed. The language of Order 23, Rule 1, sub-Rule (1) Civil Procedure Code, gives an unqualified right to a plaintiff to withdraw from a suit and if no permission to file a fresh suit is sought under sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court stay award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub- Rule (3) of that Rule. There is no provision in the CPC which requires the Court to refuse permission to withdraw the suit such Circumstances and to compel The plaintiff to proceed with it, It is, of course, possible that different considerations may arise where a set-off may have been claimed under Order 8 CPC or a counter claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit"

The learned Judge further observes on the same page 113:-

"It is to be noted that in the case of a suit between principal and agent, it is the principal alone who has normally the right to claim rendition of accounts from the agent. The agent cannot ordinarily claim a decree for rendition of accounts from the principal..."

In the instant case, defendants are not compelling the plaintiff to continue with his suit. What the defendants did is to make an application under Order 1, Rule 10 of the CPC to transpose them as plaintiff and to transpose the plaintiffs as defendants and they sought the permission of the Court for such transposition and to continue that suit after amendment. Therefore, the objection raised on behalf of the defendants in this particular case is not an insistence on their part that the plaintiff should continue his suit. They did not object to plaintiff's withdrawal or plaintiff's request that he should be allowed to withdraw the suit. The objection was that it is a suit between the partners. It is a suit filed by the plaintiffs of a dissolved partnership for accounts and each and every partner of a partnership is interested in the accounts. Therefore, even if some partners are defendants they are in the nature of plaintiffs and they be

transposed as plaintiffs. Such a proposition was canvassed, before the Supreme Court by pointing out an authority of the Madras High Court reported in *Seethai Achi v. Meyappa Chettiar* which has been relied by the respondents in this particular case. His Lordship Bhargava J. in para. 3 on page 113 has reproduced the observations of the Madras case reported in *Seethai Achi v. Meyappa Chettiar* (cited supra) as follows:

"Ordinarily, when the Court finds no impediment to the dismissal of a suit after the announcement of the withdrawal of the claim by the plaintiff, it will simply say that the suit is dismissed as the plaintiff has withdrawn from it. A order as to costs will also be passed But several exceptions have been recognised to this general rule- In suits for partition, if a preliminary decree is passed declaring and defining the shares of the several parties, the suit will not be dismissed by reason of any subsequent withdrawal by the plain-tiff, for the obvious Reason that the rights declared in favour of the defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. So also in partnership suits and suits for accounts, where the defendants too may be entitled to some reliefs in their favour as a result of the settlement of accounts, the withdrawal of the suit by the plaintiff, cannot end in the mere dismissal of the suit

We do not think, as urged by teamed counsel, that the learned Judges of the Madras High Court were lying down the principle that, in a suit for accounts, a defendant is always entitled to relief in his favour and that The withdrawal of such a suit by the plaintiff cannot be permitted to terminate the suit."

It will be seen from these observations that the Madras case is tried to be distinguished from the facts of the Supreme Court case and it has sot been over-ruled.

7. The fourth authority pointed out by Shri Pendse is reported in *Allu Appalaswamy v. Maturi Anjaneyuiu* (cited supra). Shri Pendse submitted that the facts of this case are identical with the facts in the instant case and has strongly relied upon it. A suit was filed for dissolution of partnership and settlement of accounts. In that suit, there were in all five defendants. That suit bad reached the stage of hearing and plaintiff was examined as P. W. 1. During the pendency of the suit at the stage of hearing on 13-10-1969 plaintiff's counsel represented to the Court that the plaintiff on the one band and defendants 1, 3, 4 and 5 on the other have arrived at a compromise and that the plaintiff desires to give up his case as against the second defendant. The second defendant filed another application under Order 1, Rule 10, Code of Civil Procedure, requesting the Court to transpose him as the second plaintiff and transpose the plaintiff as the, 6th defendant. There was yet another application made by defendant No, 1 whereby he requested the Court to dismiss the suit according to the terms of the compromise and direct the second defendant to institute a suit to enforce his right if any. Shri Pendse submitted that when plaintiff passed the purshis the suit has automatically come to an end and if the defendant wanted they may file a

fresh suit for dissolution but they cannot be allowed to proceed with the suit and such an order could not be passed because the Court had no jurisdiction to pass such an order in the suit. However, in the Andhra Pradesh case after the application of second defendant was dismissed and the other applications were allowed second defendant filed an appeal to the Sub-Court. The Sub-Court allowed the appeal and directed the trial Court to proceed with the suit and allow the second defendant to lead evidence even if the plaintiff did not want to proceed with the case. Thus, the facts would show that the application under Order 1, Rule 10 of the CPC made by defendant No. 2 to transpose him as plaintiff was not considered but the suit was ordered to continue and second defendant was allowed to lead evidence. This order has not been sustained and was set aside by the Andhra Pradesh High Court in which the Division Bench of the Andhra Pradesh High Court relied upon the observations of the Supreme Court already stated above. In paragraph 17, the Division Bench has observed at page 270 as follows :-

"Respectfully following the said decision, we find no difficulty in holding that the appellate Court went wrong in compelling the plaintiff to continue his suit as against defendant No. 2 although he had categorically abandoned the, suit as against him. The trial Court ought to have therefore dismissed the plaintiffs suit as against the 2nd defendant under Order XXV, Rule 1, Civil Procedure Code. As stated earlier, the plaintiff's suit ought to have been dismissed as against all the other defendants in view of the terms of the compromise which was recorded. The appellate Court's order therefore cannot be allowed to be sustained."

In my opinion, the facts of this case are distinguishable from the facts of the present case under revision.

8. It is seen that a purshis was given by the plaintiff on 6 7-1974 to withdraw this suit but no final order was passed on that purshis. Therefore the withdrawal had not become effective and during the pendency of the suit an application has been, made by the defendants tp transpose them as plaintiffs under Order 1, Rule 10 of the CPC and this Court has held that in such an eventuality the defendants can seek transposition of parties and continue the suit. This has been observed in *Edulji Muncherji Wacha v. Vulla Bhoy Kuanbhoy* as follows :-

"The plaintiff in a partnership suit to which there were twenty one defendants applied to the Court for leave to withdraw the suit, or that the suit might be dismissed. Ten of the defendants supported the plaintiff's application. Two of the defendants objected, and applied, u/s 32 of the CPC (X of 1877), that they might be made plaintiffs and that the plaintiff might be made a defendant. The Court granted their application."

This Court at page 169 of the Report has observed :-

"I think, therefore, that the Court may transpose the parties in such suits where it is shown to be necessary or desirable, in order that their pecuniary relations of debtor and creditor may be ascertained. A case cited shows that a defendant in

such a suit has been made a plaintiff in place of the original plaintiff, and the only question is whether, there & any difference of principle involved in not only making a defendant plaintiff, but at the same time making a plaintiff a defendant. I do not think there is; the defendant made plaintiff might apply to have the plaint amended so as to make the late plaintiff a defendant. If the partnership account prayed for in the suit is to be complete, all the parties to the partnership have a right, and are under an obligation to appear. If the plaintiff is not made a party defendant, it might happen that the whole object of the suit would be defeated, and needless expense thrown upon persons who have inflicted no injury upon the partnership. All the proceedings already taken might prove futile, and it might be necessary to begin the whole case over again."

In my opinion, these observations of this Court apply to the facts of the present case. The same principle has been reiterated in another ruling of this Court reported in *Devsey Khairaj v. Hirji Khairaj* which was tried to be distinguished on facts by *Shri Pendse*. The reproduction of the Head note would suffice our purpose :-

"A partnership suit is a suit of a peculiar character, and the parties to such a suit do not stand to each other precisely in the same relation as parties to suits generally. Each of the parties to a partnership suit, however he may be formally ranked, is really in turn plaintiff and defendant and in both capacities comes before the Court for the adjudication of his rights relatively to the other partners, which the Court endeavours to determine by its decree:

Hence in a suit for dissolution of partnership and for partnership accounts, under Order 1, rule 10 the Court has the jurisdiction in proper cases to transpose defendants as plaintiff?, e. g., where it would work great hardship if the death of the original plaintiff, who filed a partnership suit for partnership accounts, should put an end to the suit "

The same principle has been enunciated by the Allahabad High Court in the case reported in *Mt. Jaimala Kunwar v. Collector of Sakaranpur*. The Head-note under placitum (f) runs as under :-

""The moment an application is made by the plaintiff to withdraw the suit, the suit does not cease to exist in the eye of the law till an order is passed by the Court and when the Court comes to pass an order in can pass an order not only on the application of the plaintiff, but also on the application of persons who are interested in the suit and who desire that they should be allowed to conduct the suit"

I am, therefore, of the opinion that the mere filing of an application of the plaintiff to withdraw the suit does not determine or does not bring to an end the proceedings in the suit before the Court. The effective termination of the suit would be after the Court passes an order. As stated under Order 23, sub-rules (1), (3) of the CPC and till then the suit is pending before the Court and the Court is entitled to pass orders on applications presented by the parties in

between that period. In the instant case, the application was made under Order 1, rule 10 of the Code of Civil Procedure. The Court has given reasons why it thought fit to accept the request of the defendants in respect of the transposition of the parties. This was the partnership suit. I do not think that the reasons given by the learned Judge could be said to be arbitrary or unreasonable. Moreover, I am unable to agree with the submissions of Shri Pendse that the Court had no jurisdiction or the Court was in error in exercising jurisdiction in passing this order.

In that view of the matter, I confirm the order passed by the trial Court and pass the following order.

9. Rule discharged with costs.