

**(2002) 08 DEL CK 0077**

**In the Delhi High Court**

**Case No : I.A. No. 6431 of 2002 and S. No. 1736/96**

Wig Brothers (Builders and Engineers) Ltd.

APPELLANT

Vs

Punjab National Bank and Another

RESPONDENT

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**Date of Decision : 23-08-2002**

**Acts Referred:**

Arbitration and Conciliation Act, 1996 — Section 8

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1(1), Order 23 Rule 1(3), 151

**Citation : (2002) 100 DLT 187 : (2002) 64 DRJ 532**

**Hon'ble Judges : Surinder Kumar Aggarwal, J**

**Bench : Single Bench**

**Advocate : P.V. Kapur, Jeevesh Nagrath and V.K. Nagrath, for the Appellant; B. Datta, Senior Advocate and R.K. Joshi, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

S.K. Agarwal, J.—The plaintiff by this application under Order 23 Rule 1(1) read with Section 151 of the CPC (for short "CPC") is seeking to abandon/withdraw its suit against the defendants. The defendants have filed reply opposing the same. Facts necessary for the disposal of this application are not in dispute. I have heard the learned counsel for the parties and have been taken through the record.

2. Learned counsel for the plaintiff argued that the plaintiff filed the suit for declaration and mandatory injunction against defendants restraining defendant No. 1, (Punjab National Bank) from encashing and/or remitting any amount to defendant No. 2 (National Thermal Power Corporation Limited) under the bank guarantees detailed in para 9 of the plaint and for restraining defendant No. 2 from invoking or making demand upon defendant No. 1, for encashment of these bank guarantees and for mandatory injunction directing defendant No. 2, to discharge and return the bank guarantees. On the application of the plaintiff (IA. No. 6682/96) interim injunction was granted in its favor. At the same time, the plaintiff raised dispute regarding performance of the contract and payment of

bills etc. The disputes were referred to the arbitrator. The arbitrator found that the dispute regarding the bank guarantees was connected with the performance of the contract and adjudicated upon the same, passed the final award on 25th July, 2002. Now, plaintiff wants to unconditionally withdraw the suit and to abandon the same.

3. Learned counsel for NTPC argued that arbitrator had no jurisdiction to adjudicate upon the dispute with regard to bank guarantees. The award of the arbitrator is non est and without jurisdiction. The dispute with regard to encashment and enforcement of the bank guarantees was beyond the scope of reference, Therefore, the suit cannot be permitted to be withdrawn. The plaintiff filed an application (IA. No. 6419/99) u/s 8 of the Arbitration and Conciliation Act, 1996 for clarification that the disputes and issues concerning the said bank guarantees can be adjudicated by the arbitral tribunal, in the pending arbitration proceedings, which was dismissed as not maintainable by this court. Thus he argued that the suit be kept pending.

4. The law in this regard is well settled. There is a distinction between plaintiff's right to unconditionally withdraw the suit and the right to withdraw with liberty to file a fresh. Order 23 Rule 1(1) confers absolute right of withdrawal or abandonment which is not the same as withdrawal with the liberty to file afresh on the same cause of action, as provided under Order 23 Rule 1(3) CPC. If the suit is sought to be withdrawn under Rule 1(1) the plaintiff cannot be compelled to proceed with the suit except when there is a counter claim etc. Reference in this regard can be made to the Apex Court decision in Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co., wherein it was held:

"(2) 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), C.P.C., 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 may 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 in 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, C.P.C. or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit."

(emphasis supplied)

This application is under Order 23 Rule 1(1) CPC for abandoning and withdrawal of the suit. No liberty for filing afresh is being sought. In view of clear position of

law, permission cannot be denied. The argument of learned counsel for the defendants that arbitrator had no jurisdiction to adjudicate regarding bank guarantees, can be challenged by filing objections under the Arbitration Act. The other arguments that by virtue of interim injunction in the suit defendants filed to encash the bank guarantees of about Rs. 4.0 crores or that plaintiff's application u/s 8 of the Arbitration Act was dismissed as not maintainable, are not relevant for deciding the application. 5. For the foregoing reasons, application is allowed. The suit is dismissed as withdrawn subject to the payment of Rs. 10,000/- as costs to be deposited with Delhi Legal Services Authority, Room No. 1, Patiala House, New Delhi.