

HON'BLE SMT. JUSTICE MOUSHUMI BHATTACHARYA
AND
HON'BLE SMT. JUSTICE M.G.PRIYADARSINI

I.A.Nos.1, 2 and 3 of 2024
IN/AND
A.S.No.25 of 2006

COMMON JUDGMENT: (Per Hon'ble. Justice Moushumi Bhattacharya)

The appellants have filed I.A.No.3 of 2024 for withdrawal of the Appeal Suit.

2. The appellants were the plaintiffs in a Suit filed before the Trial Court for declaration that the appellants are the absolute owners of the suit schedule properties and are in exclusive possession over the same. The appellants also prayed for restraining the defendant No.4/Indian Overseas Bank from proceeding with the sale of the suit schedule properties.

3. The respondent No.1 in the appeal i.e., Indian Overseas Bank is the defendant No.4 and the other 3 respondents in the appeal are the defendant Nos.1-3 in the Suit.

4. By the impugned judgment dated 19.10.2005, the Suit was decreed in favour of the appellants and against the defendant

Nos.1-3 for declaration of title and exclusive possession over the suit schedule properties. The Suit was however dismissed against the defendant No.4/Bank (respondent No.1 in the appeal).

5. A curious situation has however arisen pursuant to the appellants' plea for withdrawal of the appeal. The respondent No.1/Bank supports the appellants while the respondent Nos.2-4 vehemently opposes the said withdrawal. The opposing respondents however do not have any objection if the appeal is dismissed as withdrawn without further reference to the facts which led to the appellants' prayer for withdrawal.

6. Learned Senior Counsel representing the appellants and counsel representing the respondents No.1/Bank and respondent Nos.2 and 3 have made detailed submissions including referring to the proceeding pending before the Debts Recovery Tribunal (D.R.T.) against the respondent Nos.2-4.

7. A brief background to the appeal should first be stated. The defendant Nos.1-3 and their family members had purchased the suit schedule properties *vide* a registered Sale Deed dated

16.11.1966 and became owners of the suit schedule properties by a registered partition deed dated 21.07.1970. The appellants (plaintiff Nos.1-6) purchased 3 items of the suit schedule properties under registered Sale Deeds dated 12.12.1988, 13.12.1988 and 14.12.1988 from the defendant Nos.1-3. The registration of the suit schedule properties was done in 1994. The possession of the properties however was delivered to the appellants under Agreements of Sale in 1985.

8. In February, 2004, the appellants/plaintiffs came to know that the defendant No.4/Bank had made a claim for attachment of the property and for proclamation of sale on a prior mortgage of the property which had not been disclosed by the defendant Nos.1-3 or their General Power of Attorney Holder. The appellants filed O.S.No.84 of 2004 before the Trial Court in these circumstances for declaration of title and for restraining the defendant No.4/Bank from interfering with the appellants' peaceful possession of the suit schedule property.

9. The defendants filed their respective written statements in the Suit denying the contentions of the appellants/plaintiffs and

claiming under the prior mortgage to the Agreement of Sale and the Sale Deed, which the defendants executed in favour of the plaintiffs.

10. The Trial Court framed 5 issues and a 6th additional issue in the Suit which included the plaintiffs' claim for declaration of title and exclusive possession and whether the suit schedule properties were the subject matter of Recovery Certificates issued by the D.R.T, Ernakulam, in favour of the defendant No.4/Bank. The additional issue related to the jurisdiction of the Court for trying the Suit in view of the appeal mechanism provided under Section 30 of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993, as amended.

11. The Trial Court passed a detailed judgment (impugned in the present appeal) and decided in favour of the appellants/plaintiffs for grant of relief for declaration of title and exclusive possession over the suit schedule properties against the defendant Nos.1-3 (respondent Nos.2-4 in the appeal). The Trial Court however dismissed the claim for declaration and injunction against the defendant No.4/Bank (respondent No.1 herein). The

appellants filed the present appeal to the extent of denial of relief in respect of defendant No.4/Bank. The appeal mentions that the respondent Nos.2-4 (defendant Nos.1-3 in the Suit) are not necessary parties to the appeal.

12. The events pending the appeal are of significance.

13. The appellants approached the defendant No.4/Bank for payment of the loan amount due against the subject mortgage and the defendant No.4/Bank required the appellants to pay a sum of Rs.26,32,70,423/- towards full and final settlement in terms of its letter dated 29.04.2024. The appellants paid this amount on 30.04.2024 and the Bank issued a Closure-cum-No Dues Certificate on 03.05.2024. The aforesaid documents are on record and have been disclosed to the respondent Nos.2-4/their counsel.

14. The respondent Nos.2-4 have raised strong objection to the appeal being withdrawn on the ground that they were not put on notice of the settlement arrived at between the appellants and the respondent No.1/Bank despite the said respondents having a

right over the suit schedule properties. The respondents also refer to the proceeding pending before the D.R.T. relating to the suit schedule property of the defendant No.4/Bank and contend that sale of the mortgaged property in the open market would have fetched a higher price than the amount paid by the appellants.

15. The question before us is whether the appeal can be permitted to be withdrawn in the face of the objection raised by the defendant Nos.1-3 (respondent Nos.2-4 in the appeal).

16. The facts as stated above show that the appellants have already been declared as the owners of the suit schedule properties as against the respondent Nos.2-4 by way of the impugned judgment. The impugned judgment proceeds on the basis of the appellants purchasing the suit schedule properties under the registered Sale Deeds executed in their favour by the respondent Nos.2-4 and the fact that the appellants were put in possession of the suit schedule properties.

17. The respondent Nos.2-4 (defendant Nos.1-3) have not filed any cross appeals against the impugned judgment even though

the impugned judgment is of 19.10.2005 and the present appeal is pending since 2006. Therefore, on the undisputed facts alone, the right of the defendant Nos.1-3, as owners of the suit schedule property, stood extinguished on execution of the registered Sale Deeds in 1988 as well as the impugned judgment of the Trial Court on 19.10.2005. As on date the respondent Nos.2-4 cannot claim any right over or interest in the suit schedule properties.

18. The stand taken by learned Senior Counsel appearing for the respondent No.1/Bank supports the case of the appellants. The respondent No.1/Bank relies on the Closure-cum-No Dues Certificate dated 03.05.2024 pursuant to the Bank's Sanction Letter dated 29.04.2024 with regard to the settlement of the outstanding dues by the appellants. Moreover, the Closure-cum-No Dues Certificate dated 03.05.2024 mentions A.S.No.25 of 2006 (the present appeal) filed against the impugned judgment and that the appellants shall withdraw the appeal as a condition for the settlement.

The law with regard to withdrawal of appeals:

19. Order XLI Rule 22 of The Code of Civil Procedure, 1908, provides for filing of a Cross-Objection by a respondent to a decree even though the respondent may not have challenged any part of the decree. The respondent in such cases is permitted to file a Cross-Objection against any finding made against the respondent by the Trial Court in respect of any issue which the respondent believes ought to have been made in his/her favour. The only caveat to this is that the respondent must file the Cross-Objection in the Appellate Court within 1 month from the date of service on the respondent or on the respondent's pleader of the notice of the date fixed for hearing of the appeal. The Appellate Court has the discretion to extend the period of filing of the Cross-Objection. The *Explanation* to Order XLI Rule 22 of the C.P.C. clarifies the position with regard to the filing of the Cross-Objection despite the decree or decision being in favour of the respondents, either wholly or in part. The right of a Cross-Objector is saved even if the appeal is withdrawn or is dismissed for default - Order XLI Rule 22(4) of the C.P.C.

20. In the present case, the respondent Nos.2-4 have not filed any Cross-Objections to the impugned judgment whereby the Trial Court declared the appellants/plaintiffs to be the absolute owners of the suit schedule properties. Not having filed any Cross-Objections, the said respondents do not have any right in law to agitate their grievance to the appeal being withdrawn.

21. Order XLI Rule 22(4) of the C.P.C. makes it clear that withdrawal of an appeal would not have any bearing on the right of the respondent to independently proceed with the Cross-Objections. This however would not apply in the facts of the present case since there is no Cross-Objection on the record. It should also be mentioned that even in the absence of a Cross-Objection, the respondents may have had a say in the matter of withdrawal of the appeal provided the respondents were able to show that they had become entitled to some interest in the property by reason of a judgment or decree passed in the Suit: *Sneh Gupta v. Devi Sarup*¹.

¹ (2009) 6 SCC 194

22. Order XXIII Rule 1(1) of the C.P.C. provides for withdrawal of Suits and entitles the plaintiff to abandon the Suit or part of the claim. Order XXIII Rule 1(3) of the C.P.C. provides for withdrawal of a Suit on the satisfaction of a Court that the Suit must fail by reason of a formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh Suit on the same subject- matter or part of the claim. In such cases, the Court may permit the plaintiff to withdraw from the Suit or part of the claim with liberty to institute a fresh Suit in respect of the same subject matter on such terms as the Court deems fit.

23. The consequences of the plaintiff withdrawing from a Suit or part of the claim without the permission of the Court can be found in Order XXIII Rule 1(4) of the C.P.C. Order XXIII Rule 1(5) of the C.P.C. contains a bar on the Court to permit one of several plaintiffs to withdraw from the Suit or any part of the claim without the consent of the other plaintiffs.

24. Withdrawal of an appeal from an original decree follows the discipline set out in Order XXIII Rule 1(3) of the C.P.C. The plaintiff is given an absolute discretion to withdraw a Suit or

abandon a part of the claim against all or any of the defendants under Order XXIII Rule 1(1) of the C.P.C.

25. The appellant has a similar power to withdraw an appeal under Order XXIII Rule 1(1) and (3) of the C.P.C., particularly where the respondent has not filed a Cross-Objection under Order XLI Rule 22(1) of the C.P.C: *Kalyan Singh v. Rahmu*² and *Kanhaya Lal v. Pratap Chand*³. Both these decisions reiterate that the appellant has the right to unconditionally withdraw the appeal where the respondent has not filed a Cross-Objection. The only liability of the appellant is to pay costs. Tersely put, the appellant has the right to withdraw the appeal without any strings attached and if the appellant makes such an application, the High Court has to grant it: *Bijhayananda Patnaik v. Satrughna Sahu*⁴. The Supreme Court in that decision considered the effect of Order XXIII Rule 1(1) of the C.P.C. and Section 116-A of The Representation of the People Act, 1951 with regard to the relevant

² ILR (1901) 23 All 130

³ (1931) 29 ALJ 232

⁴ AIR 1963 SC 1566

procedure to be followed by the High Court for permitting withdrawal of the appeal.

26. In essence, the power of the High Court in the matter of granting permission to withdraw an appeal under Order XXIII Rule 1(3) of the C.P.C is very limited; in fact the High Court does not have any power to refuse such withdrawal or put conditions to the withdrawal in the absence of a Cross-Objection filed by the respondent. The High Court must however be satisfied that the respondent has not become entitled to a right or interest in the subject matter of the dispute which would be affected if the appeal is withdrawn. The only power retained by the High Court is to impose terms for the permission to withdraw the appeal under the said provision of the C.P.C.

27. In the present case, the respondent Nos.2-4 admittedly do not have any interest in the suit schedule properties either on the basis of the original ownership or in view of the impugned judgment of the Trial Court which has attained finality as far as the respondent Nos.2-4 are concerned. The law, as stated above,

does not save any loopholes for the respondents to come through for objecting to the withdrawal of the appeal.

28. The contention with regard to the proceedings pending before the D.R.T. is a matter which is outside the purview of this appeal and must therefore be taken up by the concerned parties before the appropriate forum. There is also no merit in the submission of the property being sold or auctioned for fetching a higher price in view of the findings of the Trial Court which declared the appellants/plaintiffs to be the absolute owners of the suit schedule property. The respondent Nos.2-4 also cannot claim any notice of the settlement arrived at between the appellants and the respondent No.1/Bank after their right as to ownership or title was extinguished by the Trial Court in the impugned judgment.

29. This Court would have allowed withdrawal of the appeal at the very first instance had the respondent Nos.2-4 not made vigorous arguments in opposition to the same. We were hence constrained to record the background facts and those subsequent

to the impugned judgment for a complete appreciation of the factual matrix.

30. We do not find any impediment in allowing withdrawal of the appeal and allowing I.A.No.3 of 2024.

32. I.A.No.3 of 2024 is accordingly allowed and A.S.No.25 of 2006 is dismissed as withdrawn.

31. I.A.No.1 of 2024 which is for disposal of the appeal in view of the compromise entered between the appellants and the defendant No.4 (respondent No.1 in the appeal) is dismissed as withdrawn. I.A.No.2 of 2024 filed for returning of the original documents being Exs.A.1-A.88 and Exs.X1-X4 to the appellants /plaintiffs before the Trial Court is allowed. The Office of this Court shall return the original documents to the appellants within 2 weeks from the appellants' approaching the Office after due acknowledgment and replacement of the original documents with photo copies. The respondent Nos.2-4 shall be at liberty to approach the appropriate forum for return of their documents subject to the legality of their claim.

All other connected I.As. are disposed of in terms of the above. There shall be no order as to costs.

MOUSHUMI BHATTACHARYA, J

M.G.PRIYADARSINI, J

Date: 16.07.2024

va