

NATIONAL COMPANY LAW APPELLATE TRIBUNAL,
PRINCIPAL BENCH, NEW DELHI

Company Appeal (AT) (Insolvency) No.1487 of 2024

(Arising out of Order dated 05.07.2024 passed by the Adjudicating Authority
(National Company Law Tribunal), Ahmedabad, Court-2 in CP(IB)/66(Ahm)2023)

IN THE MATTER OF:

Florex Tiles,
through Authorised Representative
Mr. Pawan Mecho,
Having Office at : Plot No.19, Nr. Supergas,
Aneri Industrial Park, Vill: Ranesar,
Tal: Bavla, Dist: Ahmedabad-383220 ... Appellant

Versus

M/s. Greenstone Granite Pvt. Ltd.
Having registered office at:
Survey No.252/1,
Paiki-5 At Lakhadar,
Wakaner, Morbi ... Respondents

With

Company Appeal (AT) (Insolvency) No.1488 of 2024

(Arising out of Order dated 05.07.2024 passed by the Adjudicating Authority
(National Company Law Tribunal), Ahmedabad, Court-2 in CP(IB)/65(Ahm)2023)

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Mr. Pawan Mecho,
Having registered Office at :
Plot No.19, Nr. Supergas,
Aneri Industrial Park, Vill: Ranesar,
Tal: Bavla, Dist: Ahmedabad-383220 ... Appellant

Versus

M/s. Crystal Ceramic Industries Ltd.
Having registered office at:
Survey No.206, 207, 208, 209,
210, 211, 213,
At & PO:- Kaiyal, Shedhavi Road,
TA:-Kadi, Distt-Mehsana, Gujarat-384450 ... Respondents

Present:

For Appellant : Atul Sharma, Mr. Shivanshu Kumar, Ms. Aditi Sharma, Advocates.

For Respondent :

J U D G M E N T

ASHOK BHUSHAN, J.

These two Appeal(s) have been filed against the order dated 05.07.2024, passed by National Company Law Tribunal, Ahmedabad, Court-2 in two Section 9 Applications filed by the Appellant being CP(IB)/65(AHM)2023 and CP(IB)/66(AHM)2023.

2. Company Appeal (AT) (Insolvency) No.1487 of 2024 has been filed challenging order dated 05.07.2024 passed in CP(IB)/66(AHM)2023, by which order the Adjudicating Authority has allowed the Appellant to withdraw the petition, subject to cost of Rs.50,000/-. Company Appeal (AT) (Insolvency) No.1488 of 2024 has been filed challenging order dated 05.07.2024, by which order, the Appellant was permitted to withdraw CP(IB)/65(AHM)2023 subject to cost of Rs.50,000/-. The Appellant aggrieved by aforesaid two orders has come up in this Appeal.

3. It is sufficient to refer to the facts and pleadings in Company Appeal (AT) (Insolvency) No.1487 of 2024 for deciding the Appeal. The Brief facts of the case necessary to be noticed for deciding the Appeal are:

- (i) The Appellant claiming an Operational Debt amounting to Rs.3,51,72,942/-, which is due and in default by the Corporate Debtor M/s Greenstone Granite Pvt. Ltd. has filed an Application under Section 9 of the Insolvency and Bankruptcy Code, 2016 (hereinafter referred to as the “**IBC**”). The amount claimed was due, as per Invoices from the period 02.05.2021 to 30.03.2022.
- (ii) The Application was registered as CP(IB)/66(AHM)2023. The Adjudicating Authority issued notice in the Application on 28.03.2023 and Corporate Debtor appeared before the Adjudicating Authority.
- (iii) An IA No.409 of 2024 was filed by the Corporate Debtor levelling allegations against the Appellant of placing on record false evidence pertaining to its Demand Notice.
- (iv) The petition came to be listed before the Adjudicating Authority on 24.06.2024 along with IA No.409 of 2024, on which date, the learned Counsel for the Appellant sought permission to withdraw the Application, which was objected to by the learned Counsel for the Corporate Debtor. The Adjudicating Authority directed the Appellant to file pursish for withdrawal. Thereafter, the case was directed to be listed on 02.07.2024. The Appellant filed pursish for withdrawal.

(v) On 05.07.2024, when the Application came for consideration, the Adjudicating Authority permitted the Appellant to withdraw the Application. However, while allowing withdrawal, the Adjudicating Authority imposed cost of Rs.50,000/- to be paid to the Respondent towards legal cost. Aggrieved by which order, the Appellant has come up in this Appeal.

4. The order passed by the Adjudicating Authority runs only into four paragraphs, which are as follows:

- “1. This is an application filed by the applicant u/s 9 of the IBC, 2016. Learned Counsel for the applicant has filed withdrawal pursish to withdraw the petition with liberty to file fresh.
2. Learned Counsel for the respondent objected for conditional withdrawal at belated stage. He has submitted that pleadings are over and even written submissions are filed by them. They have stated that person who has signed fresh vakalatnama is not a partner of the firm. Withdrawal pursish is also ambiguous. No reason or sufficient cause stated for fling such pursish. As the respondent preferred an IA 409 of 2024 for forgery against the applicant, he sought withdrawal. He has also paid cost to the Prime Minister’s National Relief Fund.
3. Heard Learned Counsel for the applicant & respondent.
4. It appears that vakalatnama of new counsel is filed with no objection of the earlier counsel. Learned Counsel also have authority to withdraw the petition. In the withdrawal pursish, applicant has not mentioned any reason for withdrawal as well for liberty to file fresh petition. They have repeatedly made averment of only withdrawal of petition with liberty to file again.

As no reason is given and withdrawal is sought at belated stage, no liberty to file application again can be granted. As the pleadings are complete and much time has passed after filing application. Unnecessarily respondent is dragged into the litigation and consume time of the Tribunal. Hence, applicant must be saddled with the cost. Hence, We pass following orders:

ORDER

Applicant is allowed to withdraw the petition subject to cost of Rs.50,000/- to be paid to respondent towards legal cost.”

5. The learned Counsel for the Appellant challenging the order contends that the Adjudicating Authority committed error in not granting liberty to the Appellant to file a fresh Application. It is submitted that the Adjudicating Authority ought to have granted liberty to the Appellant to file a fresh Application. It is submitted that Adjudicating Authority ought not to have denied the liberty while allowing withdrawal of Section 9 petition. Refusal to grant liberty to file, curtails the statutory right of the Appellant. It is submitted that when Application for withdrawal is allowed, it has to be allowed along with liberty, the Application has to be read in toto, i.e. withdrawal as well as liberty to file fresh, whereas the Adjudicating Authority committed error in permitting withdrawal without granting any liberty to file a fresh petition. The learned Counsel for the Appellant in support of his submissions has relied on various judgments of different High Court and one judgment of Hon'ble Supreme Court to support his submission.

6. We have considered the submission of learned Counsel for the Appellant have perused the records.

7. As noted above Section 9 Application along with IA No.409 of 2024, came for consideration before the Adjudicating Authority on 24.06.2024. On which date, the Counsel for the Appellant sought permission to withdraw the Application, which was opposed by the Corporate Debtor. The Corporate Debtor filed an IA No.409 of 2024, where allegations have been made against the Appellant with regard to placing on record false evidence pertaining to Demand Notice. The Appellant in paragraph 7.16 has pleaded about the IA No.409 of 2024 filed by the Corporate Debtor and allegations made against the Appellant itself. Paragraph 7.16 of the Appeal is as follows:

“7.16. It is most humbly submitted that during the course of hearing of the said Section 9 Petition, the Respondent on several occasions had made assurances to make the payment. That during the pendency of the Section 9 Petition has preferred an application bearing I.A. No. 409 of 2024 levelling unfounded allegations against the Appellant qua placing on record false evidences pertaining to the demand notice. At this juncture, the Appellant most humbly states and submits that at the time of curing the defects with the registry, nothing new was brought on record by the Appellant, however, due to some inadvertence at the part of the clerk or the previously engaged professional such allegation were levelled against the Appellant who is a bona fide litigant who had approached the Ld. Adjudicating Authority with substantial and material evidences qua existence of outstanding debt due and payable by the Respondent.”

8. After the order dated 24.06.2024 passed by the Adjudicating Authority, the learned Counsel for the Appellant filed pursish for withdrawal on behalf of the Applicant. In the pursish, which was filed by the Appellant, prayer for permission to withdraw the petition was made, reserving the right to file a fresh petition. The Adjudicating Authority after considering the pursish submitted by the Appellant and prayer made by the Appellant, passed the impugned order. The Adjudicating Authority held that in the withdrawal pursish, the Appellant has not mentioned any reason for withdrawal as well for liberty to file fresh petition. The Adjudicating Authority held that as no reason is given and withdrawal is sought at belated stage, no liberty to file application again can be granted. Thus, liberty to file fresh Application was refused. Paragraph 4 of the judgment of the Adjudicating Authority is to the following effect:

“4. It appears that vakalatnama of new counsel is filed with no objection of the earlier counsel. Learned Counsel also have authority to withdraw the petition. In the withdrawal pursish, applicant has not mentioned any reason for withdrawal as well for liberty to file fresh petition. They have repeatedly made averment of only withdrawal of petition with liberty to file again. As no reason is given and withdrawal is sought at belated stage, no liberty to file application again can be granted. As the pleadings are complete and much time has passed after filing application. Unnecessarily respondent is dragged into the litigation and consume time of the Tribunal. Hence, applicant must be saddled with the cost. Hence, We pass following orders:

ORDER

Applicant is allowed to withdraw the petition subject to cost of Rs.50,000/- to be paid to respondent towards legal cost.”

9. The learned Counsel for the Appellant submits that the Adjudicating Authority while allowing the Application for withdrawal is obliged to grant liberty to file fresh petition and the Application ought to have allowed in toto or rejected in toto. It was not open for the Adjudicating Authority to allow the withdrawal and reject the prayer for filing fresh petition.

10. Order 23 Rule 1 of the Code of Civil Procedure (“**CPC**”) provides for withdrawal and adjustment of suits. Order 23 Rule 1 is as follows:

“ORDER 23 – WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim.

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other persons.

(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 such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or
(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.”

11. The principles underlying Order 23 Rule 1 are also principles relevant for Adjudicating Authority to pass order while permitting withdrawal of an Application or granting leave to institute a fresh suit. When we look into order 23 Rule 1, sub-rule (3), it is clear that it may allow the plaintiff to institute fresh suit. Sub-rule (3) begins with word “*Where the Court is satisfied,-*”. The principles under Order 23 Rule 1, cannot be read to mean that when withdrawal is allowed to a suit, the permission to allowing the plaintiff to institute a fresh suit is automatic or mandatory. The submission, which is pressed by the learned Counsel for the Appellant is against the clear principles

as embodied in Order 23 Rule 1, sub-rule (3). The permission to file fresh suit can be granted only when the Court is satisfied that there are sufficient ground for allowing the plaintiff to institute a fresh suit. The submission that it is automatic and the Court was obliged to grant permission to file fresh suit, cannot be accepted. As noted above, the Adjudicating Authority has given reason in paragraph 4 of its order, for not granting permission to file fresh suit.

12. The IBC proceedings are proceedings, which insist on timeline for completion of the proceedings. Timeline is an important and cardinal principle in IBC process. When an Application under Section 9 proceeded for more than a year, without there being any valid reason, the Appellant, cannot claim as a matter of right that it ought to have been permitted to file a fresh petition under Section 9. The Adjudicating Authority has clearly held that no reasons were either given in the pursish or placed before it for withdrawal with liberty to file fresh.

13. Now we need to notice judgments, which have been relied by the Appellant in support of his submissions. The learned Counsel for the Appellant has relied on the judgment of the Madras High Court, in the matter of ***N. Iyyaswamy & Anr. V. b. Padmini & Ors. – (2020) SCC OnLine Mad 13418***. In the above case, a suit was filed by the plaintiff in the Trial Court. An Application was filed under Order 23 Rule 1 by the Plaintiff, where District Munsif allowed the Application in part, permitting the plaintiff to withdraw

the suit and denying leave to institute a fresh suit. In paragraphs 2 and 3 of the judgment, the High Court has noticed the facts and pleadings, which are as follows:

“**2.** The suit was instituted by the plaintiffs in the Court by the District Munsif at Kotagiri, seeking permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property. The suit property is shown to be situate at Jagathala Village of Kotagiri Taluk. Upon service of notice in the suit, the defendants filed a memo stating that the village namely Jagathala is situate within the jurisdiction of the District Munsif's Court, Coonoor and not the District Munsif's Court, Kotagiri. Upon receipt of the Memo, the plaintiffs came up with an Application in IA No. 386 of 2017 seeking leave to withdraw the suit with liberty to file a fresh suit on the same cause of action in the proper Court.

3. This application was resisted by the defendants contending that if the District Munsif, Kotagiri had no territorial jurisdiction to entertain the suit. It will also not have jurisdiction to grant permission to file a fresh suit. The learned District Munsif allowed the application in part permitting the plaintiff to withdraw the suit and denying leave to institute a fresh suit. Aggrieved the plaintiffs have come up with this Civil Revision Petition.”

14. The High Court allowed the revision and set aside the order of District Munsif, refusing to grant leave to file fresh suit. It is relevant to notice that High Court has noticed in paragraphs 5 and 7 that Court haing no

jurisdiction, the learned District Munsif, ought to have exercised his power to return the plaint to the plaintiff for being presented in the proper Court.

Paragraphs 5, 6 and 7 of the judgment are as follows:

“**5.** Needless to point out that the order of the learned District Munsif is far from satisfactory. This Court and the Hon'ble Supreme Court have repeatedly point out that while dealing with an Application under Order 23 Rule 1 of the Code of Civil Procedure, the Court has to either allow it in toto or dismiss it. There cannot be a partial allowing of the application, thereby dismissing the suit as withdrawn and not granting liberty to the plaintiff to file a fresh suit. The order of the learned District Munsif is therefore liable to be set aside and it is accordingly set aside. Things do not terminate there. Admittedly, the District Munsif Court, Kotagiri has no territorial jurisdiction to entertain the suit. The suit should have been actually filed at the District Munsif's Court, Coonoor. The next question that would arise is what is the duty of the Court which realises that it has no jurisdiction to entertain the suit. Order 7 Rule 10 of the Code of Civil Procedure provides for such an eventuality.

6. Order 7 Rule 10 of the Code of Civil Procedure, reads as follows.

10. Return of the Plaint.—

(1) Subject to the provisions of rule 10A, the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted/

Explanation: *For the removal of doubts, it is hereby declared that a court of appeal or revision may direct, after setting aside the decree passed in a suit, the return of the plaint, under this sub-rule.*

(2) Procedure on returning.- *On returning a plaint, the Judge shall endorse thereon the date of presentation and return, the*

name of the party presenting it and a brief statement of reason or returning it.

7. The above provision would undoubtedly apply to the case on hand. Once it is conceded by both the parties that the Court has no jurisdiction, the learned District Munsif, ought to have exercised his power under Order 7 Rule 10 of the Code of Civil Procedure, to return the plaint to the plaintiff for being presented in the proper Court that would have resolved the issues and this Civil Revision Petition need not have been kept pending for two years now.”

15. The above judgment is clearly distinguishable, the High Court held that when the Court has no territorial jurisdiction, it ought not to have denied the leave to file a fresh suit. The Court, rather has held that under Order 7 Rule 10, the plaint was required to return to the plaintiff for being presented in the proper Court having jurisdiction. The above judgment, thus, does not help the Appellant.

16. The learned Counsel for the Appellant has relied on the judgment of Hon’ble Supreme Court in ***Vimlesh Kumari Kulshrestha vs. Sambhajirao and Anr. – (2008) 5 SCC 58***. The above was a case where a suit was filed for specific performance of contract on 09.09.1986, which was marked as OS No.228-A of 1986. Having regard to an objection taken by defendant in the written statement, the plaintiff filed another suit on 23.03.1987, which was marked as OS No.13-A of 1987. OS No.228-A of 1986, on the premise that another suit has been filed, was sought to be withdrawn, which Application was allowed. The Trial Court has decreed the suit. However, the High Court

has reversed the same, holding that in view of Order 23 Rule 1 of the CPC, the permission for filing another suit on the same cause of action having not been obtained, the second suit was not maintainable. The Hon'ble Supreme Court, in the facts of the said case held that no permission for filing second suit was necessary. The Hon'ble Supreme Court in paragraphs 9 and 14 of the judgment laid down following:

- “9.** Admittedly, the second suit was filed before filing the application of withdrawal of the first suit. The first suit was withdrawn as an objection had been taken by the respondent in regard to payment of proper court fee. We, therefore, are of the opinion that Order 23 Rule 1 of the Code was not applicable to the facts and circumstances of the present case.
- 14.** The application filed for withdrawal of the suit categorically stated about the pendency of the earlier suit. The respondent, therefore, was aware thereof. They objected to the withdrawal of the suit only on the ground that legal costs therefor should be paid. The said objection was accepted by the learned trial court. The respondent even accepted the costs as directed by the court, granting permission to withdraw the suit. In a situation of this nature, we are of the opinion that an inference in regard to grant of permission can also be drawn from the conduct of the parties as also the order passed by the court. It is trite that even a presumption of implied grant can be drawn.”

17. The Hon'ble Supreme Court further observed in the said judgment that in a situation of this nature, an inference in regard to grant of permission can also be drawn from the conduct of the parties as also the order passed by the

Court. From the above case, it is clear that it was due to objection of defendant that second suit was filed and withdrawal was made of the first suit, after filing of the second suit. Hence, the above was not a case where any leave was required to file a fresh suit, since fresh suit had already been instituted. The above judgment, does not in any manner support the case of the Appellant.

18. Next judgment relied by the learned Counsel for the Appellant is of High Court of Bombay in **Chandrakant Pandurang Shingade and Anr. vs. Walchand Gulabchand Bora and Anr. – (2019) SCC OnLine Bom 1669**, where an application was filed, challenging the order of Civil Judge dated 09.10.2007, where Suit No.30 of 2007 was withdrawn by order dated 09.10.2007. The order allowing withdrawal of the suit has been quoted in paragraph 3 of the judgment, which is as follows:

- “3. It is applicant's case that the Respondent-Plaintiff had instituted Summary Suit No. 30 of 2007 (hereinafter called ‘previous suit’) in the Court of Civil Judge, Senior Division, Baramati, but he withdrew it in pursuant to order dated 09.10.2007. It reads as under:—

“Heard the learned counsel for the plaintiff.

Perused the application. The plaintiff wants to withdraw the suit converting its nature in Special Civil Suit. I find substance in his submission. The permission is accorded to withdraw the suit. The documents and stamp be returned to the plaintiff as prayed for.”

19. After withdrawal, the plaintiff instituted a Special Civil Suit No.128 of 2007 on same cause of action. An objection was raised by defendant that previous suit was withdrawn by the plaintiff with liberty to institute a fresh suit. Hence, subsequent suit was not maintainable. The submissions of the defendant have been noticed in paragraph 4 of the judgment, which is as follows:

“4. It is applicant's case that soon thereafter Respondent instituted Special Civil Suit No. 128 of 2007 on 20.02.2008 on same cause of action, as was in the previous suit. The applicant would contend that the previous suit was withdrawn by the Plaintiff unconditionally without liberty to institute a fresh suit in terms of Rule 3 r/w. Rule 4 and Order 23 of the CPC. The applicant would therefore contend that in absence of expressed liberty to institute a fresh suit, subsequent suit (present subject suit) was not maintainable, and thus sought for rejection of plaint under Order 7, Rule 11(d) of CPC. Learned Judge rejected the said application holding that previous suit was permitted to be withdrawn, with liberty to institute a fresh suit. Aggrieved by the order dated 23.01.2014, this application is preferred.

20. In the facts of the said case, the High Court held that prayer for withdrawal and liberty to file fresh suit cannot be split up in two parts. In above case, the plaintiff wanted to withdraw the suit, converting its nature into Special Civil suit. From the order passed by the High Court, it is clear that in the submissions made by the plaintiff, the Court found substance and

permission is accorded to withdraw the suit. Observation made in paragraph 6 is as follows:

- “6. Perused application made for withdrawal of previous suit and order dated 09.10.2007. Respondent-Plaintiff, sought leave to withdraw the previous suit with liberty to file suit, having found and realized that instead of Special Summary Suit, he ought to have filed Special Civil Suit. It is more than clear from the order dated 09.10.2007, that the Learned Trial Court has recorded its satisfaction as required under Rule 3 Clause (a) of Order XXIII of the CPC and having found substance in the application, granted permission to withdraw the suit. Thus, there was complete compliance of Rule 3 of the Order XXIII CPC. Contention of the Applicant that though Plaintiff was permitted to withdraw the suit but in absence of express liberty to institute fresh suit, second suit was not maintainable, cannot be accepted. In as much as prayer for withdrawal and liberty to file fresh suit cannot be split up in two parts viz. withdrawal and liberty to file fresh suit. It has to be allowed as whole or rejected as whole. It is well settled that if an application is made for withdrawal of the suit with liberty to file suit, it is not open for the Court to grant only permission for withdrawal, without liberty to institute the proceedings, though it is open for the Court to reject such application, as held in the case of *Mario Shaw v. Martin Fernandez* reported in AIR 1996 BOMBAY 116.”

21. The observation of the High Court in paragraph 6 that if an application is made for withdrawal of the suit with liberty to file suit, it is not open for the Court to grant only permission for withdrawal, without liberty to institute the

proceedings, are observations, which are made not in accord with the legislative scheme delineated under Order 23 Rule 1, sub-rule (3). As noted above, allowing the plaintiff to institute a fresh suit can be granted by the Court, where the Court is satisfied that there are sufficient ground for allowing the plaintiff to institute a fresh suit. The provisions of Order 23 Rule 1 cannot be read to mean that whenever, an Application is filed for withdrawal of the suit, Court has necessarily and mandatorily to grant permission to the plaintiff to institute a fresh suit. In the present case, the Adjudicating Authority has specifically denied the leave to file a fresh petition as observed in paragraph 4 of the impugned order. Thus, present is a case, where there was specific denial of leave to file a fresh suit. Whereas, Bombay High Court in case of **Chandrakant Pandurang Shingade** (supra), the Court vide its order dated 09.10.2007 has clearly allowed the permission to withdraw the suit, where the plaintiff wanted to convert the nature of its suit into Special Leave Suit. When the Court found substance in submission, the permission to withdraw was granted. Thus, withdrawal was granted in the above circumstances. Hence, the High Court did not commit any error in dismissing the revision, challenging the order dated 09.10.2007 passed in Summary Suit No.30 of 207. The judgment of the Bombay High Court was in the facts of its own case and does not help the Appellant in the present case.

22. Another judgment relied on by the learned Counsel for the Appellant is the judgment of the Rajasthan High Court in the matter of **Bhalesingh vs.**

Karnaram and Ors. – (2024) SCC OnLine Raj 561, where an Application was filed by the plaintiff for withdrawal of the suit with liberty to file afresh, where the learned Trial Court permitted the plaintiff to withdraw the suit, however, the liberty to file fresh suit was not granted. In the above judgment itself, the High Court has held that power to allow withdrawal of the suit was discretionary and the plaintiff is required to make out a case in terms of Order 23, Rule 1, sub-rule (3) CPC and the Court can allow the withdrawal with liberty to bring a fresh suit only if the condition in either Clause is fulfilled. Paragraph 7 of the judgment is as follows:

“7. As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for some reason, for some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute as fresh suit. Although the power to allow withdrawal of the suit is discretionary and the plaintiff is required to make out a case in terms of Order 23 Rule 1(3) CPC and must ask for leave. The Court can allow the application under Order 23 Rule 1(3) of CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either Clause A or B i.e. existence of some formal defect or sufficient grounds.”

23. We need to notice the two judgments of the Hon’ble Supreme Court, which interprets provisions of Order 23 Rule 1 CPC. The first judgment to be noticed is in the matter of **K.S. Bhoopathy and Ors. vs. Kokila & Ors. – (2003) 3 SCR 1168**, where Hon’ble Supreme Court had occasion to consider

the provisions of Order 23 Rule 1, sub-rule (3) CPC. The Hon'ble Supreme Court in the above judgment laid down following:

“The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts; (a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court, in that case he will be precluded from suing again on the same cause of action. Neither the plaintiff can abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and (b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the Court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.

The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non suit. Therefore on principle an application by a plaintiff under sub-rule 3 cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule 1. In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existences of the circumstances justifying the grant of the such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion is to be exercised by the Court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the Court that it must

be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule (1) is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or courts below. Grant of permission for withdrawal of a suit with leave to file afresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases.”

24. Another judgment, which need to be noticed of the Hon’ble Supreme Court is in the matter of ***V. Rajendran and Anr. vs. Annasamy Pandian (Dead) through legal representatives Karthyayani Natchiar – (2017) 5 SCC 63***, where again the Hon’ble Supreme Court has laid down that power to allow withdrawal of the suit is discretionary. It is submitted that principle

under Order 23 Rule 1, sub-rule (3) is founded on public policy to prevent institution of suit again and again on the same cause of action. The Hon'ble Supreme Court in paragraph 9 laid down following:

9. Order 23 Rule 1(3) CPC lays down the following grounds on which a Court may allow withdrawal of suit. It reads as under:

“1. Withdrawal of suit or abandonment of part of claim.—(1)-

(2) * * *

(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 such suit or such part of the claim.”

(emphasis supplied)

As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b), that is, existence of a “formal defect”

or “sufficient grounds”. The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.”

25. In view of the above precedents of the Hon’ble Supreme Court, judgment of the Bombay High Court relied by learned Counsel for the Appellant in **Chandrakant Pandurang Shingade** (supra) and judgment of the Rajasthan High Court in **Bhalesingh vs. Karnaram and Ors.** cannot be followed.

26. The present is a case where the Adjudicating Authority due to reasons recorded in the judgment has refused permission to grant leave to file a fresh Application under Section 9. More so, while in the IBC proceedings, it cannot be held as a matter of right that the Applicant is entitled to withdraw the Application filed under Section 9 at any stage and pray for liberty to file afresh. As observed above, IBC is a process in which timeline has importance and from the facts of the present case, it is clear that an objection was raised by the Corporate Debtor and an IA was filed, making allegations against the Appellant, that the Appellant placed on record false evidence pertaining to Demand Notice. In the above background facts, the Adjudicating Authority permitted the Appellant to file pursish for withdrawal.

27. In view of the foregoing discussions and our conclusions, we are satisfied that no error has been committed by the Adjudicating Authority in permitting withdrawal of the Application, while denying liberty to file fresh

Application, once again. However, in the facts of the present case, we are satisfied that imposition of cost of Rs.50,000/- was not necessary.

28. In result, we dismiss both the Appeal(s), subject to deletion of cost of Rs.50,000/-, as imposed by the impugned order. Both the Appeal(s) are dismissed. We, however, observe that Appellant shall be at liberty to take such other legal remedy as available in law.

**[Justice Ashok Bhushan]
Chairperson**

**[Barun Mitra]
Member (Technical)**

**[Arun Baroka]
Member (Technical)**

NEW DELHI

13th August, 2024

Ashwani