

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

CIVIL REVISION APPLICATION NO. 762 OF 2013

Smt. Matluba w/o. Lt. Abdul Wahab & Ors.	.. Applicants (Org. Plaintiffs)
Vs.	
Mr. Zainulabdin @ Algu & Ors.	.. Respondents (Org. Defendants)

Mr. Arun Panickar a/w Mr. Nitin Parkhe for Applicants.
Mr. P.A. Sarwankar i/b Sarwankar & Co. for Respondent No.1.
Mr. Harinder Toor a/w Mr. S.R. Gupta for Respondent No.2.

**CORAM : K.R.SHRIRAM, J.
DATED : 30TH JANUARY, 2015**

P.C.

1 The applicants in this Civil Revision Application are the original plaintiffs. Respondent Nos.1 and 2, who are the main contesting respondents, were original defendant Nos.1 and 2. The original suit was filed in October 2005 by one Wahab Talukdar, who was the husband of first petitioner and the father of the other four petitioners. In less than three months after filing the suit, the said Wahab Taluikdar - the plaintiff died and the 5 petitioners were brought on record as legal heirs of the plaintiff. The first respondent is the son of the brother of original plaintiff. The second respondent has been inducted in the suit premises and presently in possession thereof. It was primarily a family dispute. The plaintiffs and the defendants had a family property in Uttar Pradesh,

for which a partition suit had been filed before the Civil Judge, Siddharth Nagar, Uttar Pradesh. The plaintiffs and the defendants decided to amicably resolve the issue and entered into consent terms to be filed in the Court of Civil Judge, Senior Division, Siddharth Nagar. As per the consent terms, the plaintiffs were to get a share of the ancestral house, along with open spaces around the house. The consent terms were signed on 23rd February 2011. In view thereof as agreed between the parties, the plaintiffs filed an application dated 15th March 2011 seeking leave to withdraw the suit. Paragraph 2 of the said application reads as under :-

“That the Plaintiffs and the Defendants settled the matter amicably across the table and accordingly they have passed/exchanged their writing by executing necessary deeds except possession. The Plaintiffs do not want to proceed further in the matter since settled. Here to annexed and marked exhibit “I” Copy of Consent Terms in C.C. No.166/2005.

We, therefore, pray that the Plaintiffs be permitted to withdraw the suit. ”

Accordingly, the Court by an order dated 15th March 2011 permitted the plaintiffs to withdraw the suit. The order passed is as under :

“The Plaintiff No.2 & 4 have taken out application exh 36 for withdrawal of the suit. The aforesaid plaintiff No.2 and 4 are C.A. of other plaintiffs also. Mr. Atthar, Adv for plaintiff is also present before the court. The defendants advocate is also present before the court. He has given no objection for withdrawal of this suit.

As the plaintiff wants to withdraw the suit, application exh 36 is allowed. This suit is disposed off as withdrawn. Court fee be refunded as per rules to the plaintiff.

However, before the Siddharth Nagar Court, the parties who had signed the consent terms did not remain present and the Court, therefore, did not pass order in terms of the consent terms. It is the case of the applicant that one of the signatories to the consent terms is the son of defendant No.1 who is also constituted attorney of defendant No.1. The said constituted attorney has also signed the written statement on behalf of defendant No.1 and also the reply to the subsequent applications. It is the case of the applicants that the signatories to the consent terms and particularly the constituted attorney of respondent No.1 does not remain present in the Court at Siddharth Nagar and, therefore, the consent terms cannot be given effect to. The applicant submitted that the applicants were made to believe that since the consent terms along with map of landed property was signed, the only formality required was to remain personally present before the Civil Judge, Senior Division, Siddharth Nagar and get the consent decree. In view thereof, in good faith and bonafide belief that order in terms of consent decree will be passed by the Siddharth Nagar Court, the applicants withdrew the R.A.D. suit No.1554 of 2005.

2 Despite repeated request, respondent No.1 did not honour the consent terms or the agreement entered into with the plaintiffs. The plaintiffs, therefore, filed an application before the Small Causes Court on 7th February 2012, praying that the order of withdrawal passed by the Court on 5th March 2011 be set aside and the suit be restored to file and the suit be heard on merit. Respondent No.1 and Respondent No.2 viz. defendant No.1 and Defendant No.2 filed reply to the said application challenging the application. The ground of challenge in short is that if the plaintiffs had any grievance in respect of non-performance of obligations under the consent terms, the plaintiffs, should file a separate suit for specific performance. The other defence is that the plaintiffs have abandoned by withdrawing the suit under Order 23 Rule 1 (A) and no liberty having been noted under Order 23 (1) (3), the Court should not permit the suit to be reinstated.

3 It was also submitted by counsel for the respondents in addition to the points mentioned earlier that even if the Advocate had not given any advice on the effect of withdrawal of a suit, the fact is that the Advocate was instructed to withdraw and therefore, the petitioners are bound by the same and cannot ask for reinstatement of the suit. The counsel submitted that there is no provision under the Civil Procedure Code permitting reinstatement of a suit which has been withdrawn. The

counsel also relied on quite a few judgments of the apex court viz. Bakshi Dev Raj (2) and another v/s. Sudheer Kumar¹, Shanti Budhiya Vesta Patel and others v/s. Nirmala Jayprakash Tiwari and others², Jhaulal and antoher v/s. Mohanlal and others³, Yunus Ali (dead) through his LRs. v/s. Khursheed Akram⁴, Kalpataru Vidya Samasthe (R) and another v/s. S.B. Gupta and another⁵, K.K. Velusamy v/s. N. Palanisamy⁶ in support of his submissions.

4 The trial Court rejected the application of the plaintiffs to restore the suit to file. The reason for rejection of the application can be found in paragraph 28, which is reproduced as under :-

“It is thus very clear that the suit was unconditionally withdrawn by the plaintiffs. There is no consent decree nor any compromise mentioned in the withdrawal application or in the order below Exh.1. The suit was clearly disposed of being withdrawn. If at all, there are any allegations or contentions of the applicants about the consent decree, those are about the suit filed before Court of Civil Judge, Senior Division, Siddharth Nagar, U.P. There is no documentary evidence at all showing that present suit was withdrawn in view of alleged consent terms or consent decree of the hon'ble Court of Siddharth Nagar, U.P. Since there are no consent terms, Order-23, Rule 3(a) is not applicable. There is no question of setting aside the order of withdrawal

¹(2011) 8 SCC 679

²(2010) 5 SCC 104

³(2013) 9 SCC 446

⁴(2008) 7 SCC 293

⁵(2005) 7 SCC 524

⁶(2011) 11 SCC 275

dated 15.03.2011. Therefore, no question of restoration of the suit to file. In the result, I answer points No.1 to 3 in the negative. ”

The Court while rejecting has also observed that no evidence was led by the parties. The Court also observed that there are some allegations against the Advocate by the plaintiffs, but those are not about fraud or misrepresentation but only to the extent that the effect of withdrawal was not explained properly. The Court also observed that there is no evidence to show that any action was taken against the advocate.

5 The lower court has rejected the application on the grounds that a) the suit was unconditionally withdrawn, b) no consent decree nor compromise is mentioned in the withdrawal application, c) the allegations and contentions of the applicants are those about the suit filed before the Court of Civil Judge, Senior Division, Siddharth Nagar, Uttar Pradesh and d) there is no documentary evidence at all showing that present suit was withdrawn in view of alleged consent terms or consent decree of the Hon’ble Court of Siddharth Nagar, Uttar Pradesh.

6 Though this Court’s power of Revision under Section 115 is very limited, this Court is empowered to interfere if the findings are perverse or there has been a non-appreciation or non-consideration of material evidence on record by the Courts below.

7 When one considers the application for withdrawal, in paragraph 2, it is expressly mentioned that the plaintiffs and defendants have settled the matter amicably and accordingly have passed/extended their writing by necessary deeds and the plaintiffs do not want to proceed further in the matter since it is settled. A copy of the consent terms is also annexed to the application. Therefore, the Court was patently wrong in stating that no consent decree or compromise is mentioned in the withdrawal application. The Court is also patently wrong in stating that there was no documentary evidence at all showing that suit was withdrawn in view of alleged consent terms. On these grounds alone the impugned order ought to be set aside.

8 Moreover, the admitted position is consent terms were entered into. The parties have not gone to the court of Civil Judge, Senior Division, Siddharth Nagar, so that the consent terms could be taken on record and decree accordingly be passed. Admittedly, respondent No.2 is not a party to the consent terms. But the stand of respondent No.1 also was that he is not a party to the consent terms. But the indisputable fact is the son of Respondent No.1 is a party to the consent terms and the same son is also the constituted attorney of respondent No.1 in R.A.D. Suit No.1554 of 2012. When the Court asked a question as to why they were not honouring the commitment, the only answer that the counsel

for respondent No.1 gave was that in that case let the plaintiffs file a suit for specific performance. It is rather unfortunate that such a stand which smacks of utter dishonesty is taken by respondent No.1. Respondent No.1 and his son who is the signatory to the consent terms have induced the plaintiffs to withdraw the suit by promising a partition in the ancestral property. It is also stated that it was respondent No.1 who had prepared the consent terms to be filed in the Court of Civil Judge, Senior Division, Siddharth Nagar, Uttar Pradesh. It is rather unfortunate that respondent No.1 has taken such a stand that having deceived the plaintiffs by inducing them to withdraw the suit, he wants the plaintiffs to file another suit for specific performance of the consent terms. The plaintiffs were misled into making an application for withdrawal of the suit. In effect the consent of the plaintiff to withdraw the suit has been procured by fraud and in such situation the Court will not be powerless. The court can certainly exercise its power under Section 151 of the Code of Civil Procedure in the interest of justice. The position is well established that when the Code of Civil Procedure is silent regarding the procedural aspect, the inherent power of Court can come to its aid to act *ex debito justitiae* for doing real and substantial justice between the parties. In paragraph 25 and 26 of the judgment in the matter of Jet

Plywood (P) Ltd. and another v/s. Madhukar Nowlakha and others⁷, it is held as under :-

“25. The aforesaid position was reiterated by the learned Single Judge of the High Court in his order dated 4-2-2005 though the language used by him is not entirely convincing. However, the position was clarified by the learned Judge in his subsequent order dated 14-3-2005 in which reference has been made to a Division Bench decision of the Calcutta High Court in Rameswar Sarkar which, in our view, correctly explains the law with regard to the inherent powers of the Court to do justice between the parties. There is no doubt in our minds that in the absence of a specific provision in the Code of Civil Procedure providing for the filing of an application for recalling of an order permitting withdrawal of a suit, the provisions of Section 151 of the Civil Procedure Code can be resorted to in the interest of justice. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act 'ex debito justitiae' for doing real and substantial justice between the parties. This Court had occasion to observe in Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal as follows : (SCR p.459)

“It is well settled that the provisions of the Code are not exhaustive for the simple reason that the legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them.”

26. Based on the aforesaid principle, the Division Bench of the Calcutta High Court, in almost identical circumstances in Rameswar Sarkar case, allowed the application for withdrawal of the suit in exercise of inherent powers under Section 151 of the Code of Civil Procedure, upon holding that when

⁷(2006) 3 SCC 699

through mistake the plaintiff had withdrawn the suit, the court would not be powerless to set aside the order permitting withdrawal of the suit.

(emphasis supplied.)

In the judgment in *Dadu Dayal Mahasabha v/s. Sukhdev Arya and another*⁸, Para 7 reads as under :-

“7. Let us consider the cases in which consent decrees are challenged. If a party makes an application before the court for setting aside the decree on the ground that he did not give his consent, the court has the power and duty to investigate the matter and to set aside the decree if it is satisfied that the consent as a fact was lacking and the court was induced to pass the decree on a fraudulent representation made to it that the party had actually consented to it. However, if the case of the party challenging the decree is that he was in fact a party to the compromise petition filed in the case but his consent has been procured by fraud, the court cannot investigate the matter in the exercise of its inherent power, and the only remedy to the party is to institute a suit. It was succinctly summed up in the aforementioned case that the factura of the consent can be investigated in summary proceedings, but the reality of the consent cannot be so investigated. The principle has been followed in this country for more than a century. In *Vilakathala Raman v. Vayalil Pachu*, the trial court had vacated its previous order regarding satisfaction of decree on the ground that the same was obtained by the judgment debtor's fraud on the court. The High Court, while confirming the order, said that in the exercise of inherent power under Section 151 of the Code of Civil Procedure a court can vacate an order obtained by fraud on it. Reliance had been placed on an old decision of Bombay High Court of 1882 and a Madras decision of 1880. In *Basangowda Hanmantgowda Patil v. Churchigirigowda*

⁸(1990) 1 SCC 189

Yogangowda, the defendant applied to the court to set aside a compromise decree on the ground that he had not engaged the lawyer claiming to be representing him and had not authorised him to compromise the suit. The court accepted his plea and ruled that it is the inherent power of every court to correct its own proceedings when it has been misled. Similar was the view of the Calcutta High Court in several decisions mentioned in Sadho Saran case. The ratio has been later followed in a string of decisions of several High Courts. The same principle applies where a suit is permitted to be withdrawn on the basis of a prayer purported to have been made on behalf of the plaintiff. The courts below were, therefore, not right in holding that the application of the appellant invoking the inherent jurisdiction of the court was not maintainable. If the appellant's case is factually correct that Hari Narain Swami was not its elected Secretary and was, therefore, not authorised to withdraw the suit, the prayer for withdrawing the suit was not made on behalf of the appellant at all and the impugned order was passed as a result of the court being misled. Such an order cannot bind the appellant and has to be vacated. The trial court was thus clearly wrong in dismissing the appellant's application as not maintainable, and the High Court should have intervened in its revisional power on the ground that the trial court had failed to exercise a jurisdiction vested in it by law. ”

9 In the circumstances, in my view Civil Revision Application ought to be allowed in terms of prayer clause (a) and is hereby allowed with costs in the sum of Rs.25,000/- to be paid by Respondent No.1 to the Petitioners within two weeks.

(K.R. SHRIRAM, J.)