

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% Order delivered on: 9th September, 2015

+ **CS(OS) No.1592/2015**

RAJEEV SAUMITRA Plaintiff
Through Mr.P.V.Kapur, Sr.Adv. with
Mr.Mahipal Singh Rajput,
Mr.Rahul Kumar, Ms.Divyya
Kapur, Mr.Sidhant Kapur,
Mr.V.K.Nagrath & Mr.Abhay
Varma, Advs.

versus

NEETU SINGH & ANR Defendants
Through Mr.Sandep Sethi, Sr.Adv. and
Ms.Geeta Luthra, Sr.Adv. with
Mr.Kumar Sushobhan &
Mr.Imran Ahmad, Advs.

**CORAM:
HON'BLE MR.JUSTICE MANMOHAN SINGH**

MANMOHAN SINGH, J.

**I.A. No.17610/2015 (u/o XXIII R.1(3) CPC, by plaintiff) and
CS(OS) No.1592/2015, I.A. No.11514/2015 (u/o XXXIX R.1 & 2
CPC) and I.A. No.13165/2015 (u/o VII R.11 CPC)**

1. The plaintiff has filed the present suit being CS (OS) No.1592/2015 (hereinafter referred to as the "First Suit") for permanent injunction, rendition of account and damages for a sum of Rs.25 lac against two defendants, namely, Neetu Singh and M/s K.D.

Campus Pvt. Ltd. Summons in the said suit were duly issued. The defendants appeared, however, no written statement was filed on their behalf, rather they chose to file an application under Order VII Rule 11 CPC.

2. It appears from the record that since the interim order was not passed on 26th May, 2015, the said order was challenged before the Division Bench by filing of an appeal being FAO(OS) No.301/2015. By order dated 10th August, 2015, the Division Bench asked the Single Judge to dispose of the interim application filed by the plaintiff being I.A. No.11514/2015, on 24th August, 2015.

3. In the meanwhile, the plaintiff filed the fresh application being I.A. No.17610/2015 under Order XXIII Rule 1(3) CPC for withdrawal of the suit, with liberty to file the fresh suit. The matter was listed before Hon'ble the Judge Incharge (Original Side).

4. It is pertinent to mention here that on 21st August, 2015, the same very plaintiff filed another suit being CS (OS) No.2528/2015 (hereinafter referred to as the "Second Suit") for, *inter-alia*, declaration, rendition of account, damages, permanent and mandatory injunctions, against three defendants, namely, Neetu Singh, M/s K.D. Campus Pvt. Ltd. and M/s Paramount Coaching Centre Pvt. Ltd. The second suit was listed before this Court. The factum of the first suit was mentioned in the second suit in para 24 which reads as under:-

"24. That in order to restrain Defendant No. 1 from indulging in the aforesaid wrongful actions the Plaintiff had on 26/05/2015 instituted a suit being CS (OS) No. 1592 of 2015 alongwith an application under Order 39

Rules 1 and 2 of the Code of Civil Procedure, 1908 by an order dated 26/05/2015, the Hon'ble single judge issued notice for completion of service and pleadings list before Joint Registrar on 7.10.2015. Being aggrieved by the said order the Plaintiff preferred an appeal being FAO (OS) 301/2015. By an order dated 10/08/2015, the Hon'ble Division Bench was pleased to direct the learned single judge that the Plaintiff's application under Order 39 Rules 1 and 2 be heard on 24/08/2015. However, in the meanwhile the Plaintiff has been advised that the said suit suffers from technical defects and would require copious amendments. Thus, in order to save time and to avoid needless confusion, the Plaintiff has been advised to withdraw the said suit and instead institute a fresh action, which the Plaintiff is hereby doing. The Plaintiff has accordingly also filed an application under Order 23 Rule 1(3) for withdrawal of the said suit and has sought leave of this Hon'ble Court to institute the present action."

5. The reasons for filing the fresh second suit are mentioned in paras 19 to 23 and 25 of the plaint thereof. The extracts of the same reads as under:-

"19. That in addition to diverting the business of Defendant No.3 to Defendant No.2 by misleading the public into believing that the two companies are associated, the Defendant No.1 has been soliciting students that approach Defendant No.3 to take admission in Defendant No.2. To lure them into abandoning Defendant No.3, she has been providing a concessional special fee rate for Paramount students to join Defendant No.2. The sisters of Defendant No.1, Manju Singh and Maya Chaudhary and brother in law, R.K. Chaudhary are assisting the Defendant No.1 in the process. Even the Defendant No.1 has instructed staff members of Defendant No.3 to lure old and new students of Defendant No.3 to join Defendant No.2. At present, the estimated loss caused to the plaintiff by such solicitation is over Rs.2

crores. It is submitted that the Defendant Nos.1 and 2 are jointly and severally liable to pay damages of Rs.2,01,00,000/- (Rupees Two Crore one Lac) to the Defendant No.3.

20. That in addition, Defendant No.1 has given her nephews key positions in Paramount Reader Publication OPC Pvt. Ltd. so as to solicit more students and innovate new techniques of plundering Defendant No.3 and to use the books and journals and other study materials of Defendant No.3 for coaching in various subjects for the benefits of Defendant No.1 and causing wrongful gain to the Defendant No.3 and the plaintiff.

21. That Defendant No.1 in her capacity as a director of Defendant No.3, is bound and obliged to act for the benefit of the company and must not allow herself to be placed in a position of conflict with the Defendant No.3 company. Here, Defendant No.1 has incorporated a competing business under the banner of K.D. Campus Pvt. Ltd. and has placed her personal pecuniary interest above than that of Defendant No.3. The plaintiff has and is continuing to use her position as director to usurp business of Defendant No.3's business. In doing so, Defendant No.1 has caused immense loss to Defendant No.3 business and reputation and has gained an undue advantage and wrongful financial gain to herself and to her relatives at the cost of Defendant No.3.

22. That further, Defendant No.1 has made vicious statements publically that reveal her malafide intention to sabotage the plaintiff's and Defendant No.3's years of goodwill and work, which in itself is a sufficient breach of her duty to Defendant No.3. On whatsapp groups, the defendant No.1 has made statements such as "2 months me dho dala h. 2 saal me naam mita dunga. Aag lagi h Rajeev Saumitra. Tumko Sadak par utaar ke hi bujhegi. Tab tak me teej ka vrat bhi karungi. Tujhe jinda rakhna

bhi jaruri h” and “Kutto ke sath wah aap ne toh Kutiya bhi paal rakhi h. great going”. In addition, on facebook, she has made statements such as “Congratulations to all well wishers-cases against K.D. Campus Pvt Ltd and Paramount Reader Publication have been decided in our favour”.

23. That given Defendant No.1 actions and demonstrated mala fide intention, as revealed by the aforestated communications, it is clear that Defendant No.3 is in danger at the behest of Defendant No.1. Defendant No.1 intends to plunder Defendant No.3 to establish Defendant No.2. As demonstrated above, Defendant No.2 is far from acting for the benefit of Defendant No.3.

24. x x x x

25. That the cause of action arose in favour of the plaintiff on 21st May, 2015 when the plaintiff noticed that Defendant No.1 has advertised Defendant No.2 on Defendant No.3’s official website. The cause of action arose, when Defendant No.1 and 2 widely advertised the starting date of the new batches of K.D. Campus using the phrase ‘A new venture by Neetu Singh. Founder/Director of Paramount Coaching Centre Private Limited’. The cause of action arose when defendant No.1 portrayed Defendant No.3’s students and professors as those of Defendant No.2. The cause of action arose when Defendant No.1 advertised and promoted Defendant No.2 on the official website of Defendant No.3 and on Paramount Reader Publication OPC Pvt. Ltd. The cause of action is still subsisting and continuing on a day to day basis as the illegal acts of promoting Defendant No.1 and 2 by causing loss of business and financial loss to the Defendant No.3 vis-s-vis the plaintiff is still continue and subsisting.”

6. It is pertinent to mention that when the first suit was listed before Hon'ble the Judge Incharge (Original Side) on 24th August, 2015, it was recorded in the order that as the fresh suit was stated to have been instituted by the plaintiff against the defendants and the same was listed before this Court, therefore, the first suit was also transferred to this Court for 25th August, 2015.

7. On 25th August, 2015 when both the suits were listed, the prayer made in the application for withdrawal of the first suit was opposed by the learned counsel for the defendants. One week time was granted to file the reply. The same has been filed. The said application was taken up on 3rd September, 2015. Learned counsel for the parties made their submissions at great length in the said application. No time was left to dictate the order. Therefore, a short order was passed in the evening, which reads as under:-

"I.A. No.17610/2015 (u/o XXIII R.1(3) CPC, by plaintiff) and CS(OS) No.1592/2015, I.A. No.11514/2015 (u/o XXXIX R.1 & 2 CPC) and I.A. No.13165/2015 (u/o VII R.11 CPC)"

The abovementioned application has been filed by the plaintiff under Order XXIII Rule 1(3) CPC for withdrawal of the suit, with liberty to file the fresh suit. This application was heard on the last date. As the reply was not filed, the same was adjourned for today. When the matter is listed today, both the parties have made their submissions and they have also referred the judgments in support of their submissions.

Having considered the said decisions, I am inclined to allow the prayer made in the application. Ordered accordingly. The reasoned order to follow.

Copies of this order be given *dasti* to the learned counsel for the parties, under the signatures of the Court Master.”

8. As per the above order, the reasoned order was to be passed, therefore, the same is being passed accordingly.

9. It is stated in the application for withdrawal of the first suit filed by the plaintiff that since there are technical defects of not impleading M/s Paramount Coaching Centre Pvt. Ltd. as a separate defendant and the suit ought to have been filed by the plaintiff on behalf of the said defendant being under fiduciary capacity for the benefit of the said defendant, thus, the plaintiff was left with no option but to file the fresh suit in order to remove the technical defects. Therefore, the plaintiff instead of amending the plaint, which might have taken much time, wishes to withdraw the first suit and file the fresh suit after a liberty in this regard is granted by the Court.

10. The application is opposed by the learned counsel for the defendants, on the ground that there is no bonafide on the part of the plaintiff to file the fresh second suit. The first reason given by the learned counsel for the defendants is that the plaintiff has chosen to enhance the pecuniary jurisdiction from Rs.25 lac to Rs.2 crores so that the matter would not be transferred to District Courts in due course. The second objection raised by the counsel is that once the first suit was pending for the same cause of action, the fresh suit during the pendency of the first suit is not maintainable. In case, the liberty is granted, there would be no end to litigation and the said conduct of the plaintiff would be in violation of Order II Rule 2 CPC.

11. Learned counsel for the parties have referred a large number of judgments. The same are as under:-

Judgments referred by the plaintiff

- (i) ***Skyline Education Institute v. S.L. Vaswani & Anr.***, (2010) 2 SCC 142
- (ii) ***Norma (India) Ltd. v. Sameer Khandelwal and Ors.***, 2007 (93) DRJ 318.
- (iii) ***M/s Virgo Industries (Eng.) P. Ltd. v. M/s Venturetech Solutions P. Ltd.***, (2013) 1 SCC 625
- (iv) ***Bengal Waterproof Limited v. Bombay Waterproof Manufacturing Company and Another***, (1997) 1 SCC 99.
- (v) ***Sucha Singh Sodhi (Deceased) through LRs. v. Baldev Raj Walia & Anr.***, 2014 (141) DRJ 477

Judgments referred by the defendants

- (i) ***Jugal Kishore vs. Ram Bux and Ors.***, 1985(1) WLN (Raj.) 588.
- (ii) ***Tarachand Bapuchand v. Gaibihaji Ahmed Bagwan***, AIR 1956 Bom632.
- (iii) ***The Asian Assurance Co. Ltd. v. Madholal Sindhu and others***, AIR 1950 Bom378.
- (iv) ***Brahmanand v. Prabhati***, 1977(2) RCR(Rent) 503
- (v) ***Norma (India) Ltd. v. Sameer Khandelwal and Ors.***, (supra)
- (vi) ***Deepa Dua v. Tejinder Kumar Muteneja***, 2013 (137) DRJ 653

(vii) ***M/s Virgo Industries (Eng.) P. Ltd. v. M/s Venturetech Solutions P. Ltd.***, (supra)

12. Having gone through the judgments referred by the defendants, I am clear in my mind that the facts and circumstances in those cases are entirely different. Once the conditions of withdrawal of suit and the permission sought to file the fresh suit as well as the provisions of Order XXIII are satisfied, the Court can allow the application under Order XXIII Rule 1 CPC for withdrawal of the suit, no further arguments are necessary.

13. The provisions of Order XXIII Rule 1 CPC reads as under:-

“ORDER XXIII
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 person.

(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 precluded 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.”

14. In case, the provisions of Order XXIII Rule 1(3) (a) & (b) CPC are read in a meaningful manner, it is clear that if the Court is satisfied that it is a formal defect and there are sufficient grounds for allowing the application to institute a fresh suit for the subject-matter of a suit or part of a claim, the plaintiff can be permitted to withdraw his claim as a whole or part, but he cannot be precluded from suing

again on the same cause of action by filing a fresh suit after obtaining leave from the Court.

15. In the present case, it is apparent from the statement made by the plaintiff in the second suit that it is a formal defect and the cause of action and the relief of the subject-matter of the second suit are on the same terms. In case, the contents of para 19-23 and 25 of fresh suit are read, there is no force in the submission of the learned counsel for the defendants that the second suit is not maintainable when the first suit was still pending. It is a matter of fact that the plaintiff has filed the second suit in a transparent manner, nothing has been concealed by the plaintiff from the Courts. *Prima facie* valid reasons have been given to file the fresh suit. The interim order was neither passed in the first suit nor in the second suit, the plaintiff has pressed for an *ex parte* order without withdrawing the first suit filed by the plaintiff. In the second suit, even the summons and notice were not issued. On the first date itself, when the suit was listed, the learned counsel for the plaintiff had informed the Court that the first suit was listed before Hon'ble the Judge Incharge (Original Side), on mentioning, the said suit was transferred to this Court. Counsel for the plaintiff has alleged that as there is defect in the first suit, in order to avoid delay for the purpose of filing the amendment application in the first suit, rather the plaintiff has chosen to file fresh suit as the plaintiff is seeking urgent interim orders. There is a force in the submissions of the learned Senior counsel for the plaintiff.

16. As far as the objections raised by the defendants that there is no bonafide on the part of the plaintiff to file the second suit in order

to enhance the pecuniary jurisdiction and the second suit is hit by Order II Rule 2 CPC are concerned, the said submissions cannot be considered while deciding the present application. However, the defendants are granted liberty to raise the said objections in the second suit filed by the plaintiff. Therefore, at the present moment the bonafide of the plaintiff cannot be doubted. As far as the objection of pecuniary jurisdiction is concerned, so far no matter has been ordered to be transferred. In view of enhancement of pecuniary jurisdiction, merely a notification has been issued. Thus, no malafide is found at present.

17. In view of the above, the prayer made in the application is allowed. Consequently, the plaintiff is permitted to withdraw the first suit being CS (OS) No.1592/2015, with liberty to file the fresh suit which is already filed by the plaintiff. The said suit is accordingly dismissed as withdrawn. Pending applications also stand disposed of.

18. I.A. No.17610/2015 is disposed of.

(MANMOHAN SINGH)
JUDGE

SEPTEMBER 09, 2015