IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 3190 2006
WITH
NOTICE OF MOTION NO. 2081 OF 2012
IN
SUIT NO. 3190 2006

Suresh Lachhmandas Raheja .. Plaintiff
Vs.
Gopal Lachhmandas Raheja
& Ors. .. Defendants

ALONG WITH
INTERIM APPLICATION NO. 1 OF 2019
AND
INTERIM APPLICATION NO. 2 OF 2019
IN
SUIT NO. 3190 2006

Mrs. Sonali Nimish Arora .. Applicant/
[Orig. Defendant No.1(c)]

<u>In the matter between :</u>

Suresh Lachhmandas Raheja .. Plaintiff
Vs.
Gopal Lachhmandas Raheja
& Ors. .. Defendants

WITH
COUNTER CLAIM NO. 25 OF 2010
IN
SUIT NO. 3190 2006

Ferani Hotels Pvt. Ltd. .. Plaintiff
Vs.
Suresh Lachhmandas Raheja .. Defendant

ALONG WITH
INTERIM APPLICATION NO. 1 OF 2019
AND
INTERIM APPLICATION NO. 2 OF 2019
IN
COUNTER CLAIM NO. 25 OF 2010
IN
SUIT NO. 3190 2006

Mrs. Sonali Nimish Arora .. Applicant/
[Orig. Defendant No.1(c)]

In the matter between :

Ferani Hotels Pvt. Ltd. .. Plaintiff
Vs.
Suresh Lachhmandas Raheja .. Defendant

Mr.Bharat Zaveri i/b Kanga & Co. for plaintiff in Suit No.3190 of 2006.

Mr. Hrushi Nagvekar, i/by Vijay Kakwani, for Defendant No.1(a) in Suit No. 3190 of 2006.

Mr.Chirag Mody a/w Mr. Vyom Shah, and Ms. Archana Karmokar, Mr.Kinnar Shah and i/by Divya Shah Associates, for applicant/defendant No.1(c) in IA/1/2019, IA/2/2019 in S/3190/2006 and CC/25/2010.

Mr. D.J. Khambata, Senior Advocate with Mr. Sarosh Bharucha, Mr. Vivek Vashi, Alya Khan, Ms. Aditi Bhansali and Mr. Ankit Pathak i/by Vashi & Vashi, for defendant No.3 in Suit No.3190 of 2006 and for plaintiff in CC No.25 of 2010.

Ms. Aishwarya Wagle i/b M/s Hariani & Co. for Defendant Nos. 2 and 4 in Suit No. 3190 of 2006.

CORAM : N.J. JAMADAR, J.

DATE : 16TH DECEMBER 2019

ORAL ORDER :

1. These applications have been filed by defendant No.1(c) in Suit No. 3190 of 2006 seeking to restrain the plaintiff from withdrawing the suit and the release of the bank guarantee to the tune of Rs.200 crores furnished by the plaintiff in favour of the Prothonotary and Senior Master of this Court and the withdrawal of the amount of Rs.16,40,00,000/- deposited by the plaintiff, pursuant to the orders passed by the Supreme Court and this Court, respectively.

2. The defendant No.1(c), by preferring another set of applications in

Counterclaim No. 25 of 2010 in Suit No. 3190 of 2006, has also prayed that the defendant No.3 to the suit, who has filed the counterclaim, be disallowed to withdraw the counterclaim, without the consent of the applicant.

3. Though the litigation between the applicant and the respondent No.1(a) has a chequered history, for the purpose of determination of these applications, the background facts can be noted in two parts. The first, facts leading to the institution of the suit and counterclaim thereto. The second, the circumstances in which the applicant seeks to restrain the plaintiff and the defendant No.3 from withdrawing the suit and the counterclaim, respectively.

(a) The plaintiff instituted the suit, *inter-alia,* against his brothers Gopal, Chandru, and Ferani Hotels Private Limited (‘Ferani’) seeking specific performance of the agreement wherein the plaintiff claimed 21.42 % share in the properties which were acquired from late F.E. Dinshaw Trust and referred to as ‘the second lot’. The claim of the plaintiff was based on an agreement which was allegedly executed in the nature of family settlement/arrangement amongst the brothers. The defendant No.1(a) to 1(c) to the suit are the legal representatives of Gopal, the deceased defendant No.1.

(b) In the said suit, the plaintiff took out a Notice of Motion No.3899 of 2006 and sought ad-interim relief in the nature of restraining the defendants from carrying out development of the property to the extent of 21.42% share claimed by the plaintiff therein. It was averred that in terms of the family settlement/arrangement the plaintiff was given 21.42 % share in the properties referred to as ‘the first lot’. However, the defendants were developing the entire property depriving the plaintiff of his 21.42 % share therein.

(c) By an order dated 26th March 2007, this Court, *inter-alia,* directed the parties to maintain status-quo with regard to the suit property which are vacant or open plot of land and/or portions of the property where the work has been done up to the plinth level only, till further orders. In view of the submissions that the plaintiff was ready and willing to pay his proportionate share towards acquisition of the properties, to the extent of 21.42%, this Court also directed the plaintiff to deposit proportionate amount in this Court within six weeks matching his share in the property to the extent of 21.42% for the cost incurred by the contesting Defendants for procuring the right, title, interest in the disputed property described as ‘Lot No.2’, to show his readiness and willingness to perform his part of the contract. It was, however, recorded that such deposit will be without prejudice to the rights and contentions of the defendants.

(d) It is indisputable that in pursuance of the said direction, the plaintiff deposited an amount of Rs.16,40,00,000/- with the Prothonotary and Senior Master of this Court.

4. This order was carried in appeal by defendant No.1, being Appeal No. 284 of 2007, and also by defendant No.3 being, Appeal No. 270 of 2007. The Division Bench of this Court was persuaded to partly allow the the appeals by judgment and order dated 30th November 2007 and direct, *inter-alia,* as under :-.

> *"3. Defendants and their agents and servants hereby restrained from carrying out any development construction in 21.42% portion of each category of land i.e. buildable, residential, non-residential, commercial etc. out of the suit land described in Part-II of Exh-A attached to the plaint till the disposal of the Notice of Motion.*
> *4. Defendants are restrained from creating any third party interest in respect of the above mentioned portion i.e. 21.42% of the said land till the disposal of the Notice of Motion.*
>
> *5. The Plaintiff shall furnish an undertaking by way of an affidavit and also furnish security bond to the extent of 21.42% of the valuation clause of the plaint to the satisfaction of Prothonotary and Senior Master of this Court within four weeks from today, to compensate the defendants in the event the Notion of Motion and/or the suit is dismissed."*

5. By a subsequent order dated 17th January 2008, the aforesaid order was modified and the plaintiff was directed to furnish security to the extent of Rs. 200 crores to the satisfaction of the Prothonotary and Senior Master in terms of the order.

6. The defendant No.3 assailed the orders passed by the Division Bench before the Supreme Court, in Civil Appeal No. 7115 of 2012. The Supreme Court, after recording the agreement arrived at between the parties disposed of the appeal on 27 September 2012 on the agreed terms. The term material for the determination of the application reads as under :

> *"(1) Respondent No.1 shall furnish to the satisfaction of the Prothonotary and Senior Master of the Bombay High Court an unconditional irrevocable bank guarantee of a Scheduled Bank favouring the Prothonotary and Senior Master of the Bombay High Court for a sum of Rs.200,00,00,000/- (Rupees Two hundred Crores only) within 12 weeks from date of this order, as security in terms of the order dated 30.11.2007 read with Order dated 17.01.2008 of the Division Bench of the Bombay High Court and the order passed by this Court dated 28.07.2008 in SLP(C) No. 9785 of 2008 to compensate the defendant-appellant no.s1 to 3 for any loss suffered in the event Notice of Motion No. 2899 of 2006 is eventually dismissed."*

7. The defendant No.3 filed a counterclaim in the suit and prayed for a sum of Rs. 500 crores by way of damages and/or compensation for the period the defendant No.3 was restrained from utilizing the suit properties on account of the orders passed by this Court. It is imperative to note that the prayers in the counterclaim were made contingent upon the dismissal of the suit. It was prayed that in the event of dismissing or rejecting the plaintiff's purported claim in the suit for specific performance, the plaintiff be directed to pay the damages and/or losses to the tune of Rs. 500 crores to defendant No.3.

8. A new front of litigation, in the meanwhile, got opened in wake of the disputes between Gopal and his son Sandeep Raheja, the defendant No.1(a) herein. It was alleged by Gopal that the defendant No.1(a) had usurped the control over the assets and properties of the Gopal Raheja Group of Companies unlawfully. The companies, including the defendant No.3 Ferani, were, in fact, completely owned by Gopal. Certain shares were transferred in the name of defendant No.1(a) in a fiduciary capacity and the defendant No.1(a) had no right, title and interest therein. In the aforesaid background, the deceased defendant No.1 Gopal instituted the suit bearing No. 2363 of 2012 against the defendant No.1(a) and others. The question of ownership of defendant No.3-Company is stated to be subjudice therein. Defendant No.1 Gopal died on 18th March 2014. The defendant No.1(c) Sonali got herself transposed as a plaintiff in the said suit.

Defendant No.1(c) Sonali instituted another suit bearing No.1031 of 2015 against the defendant No.1(a) and others for administration of the estate of Gopal, after the demise of Gopal.

The defendant No.1(c) also propounded a Will and testament of Gopal dated 12th January 2012 and two codicils, dated 8th August 2012 and 11th February 2014.

The defendant No.1(a) filed caveat in the said Testamentary Petition No. 1140 of 2014. The petition has thus been converted into Testamentary Suit No. 115 of 2014.

The defendant No.1(a), on his part, propounded another Will. The defendant No.1(c) filed a caveat therein. Testamentary Petition No. 1124 /2014 has thus been converted into Testamentary Suit No. 63 of 2015.

The defendant No. 1(b) instituted a suit bearing No. 777 of 2014 seeking specific performance of an alleged oral family arrangement including the shares of defendant No.3-Company. At the instance of defendant No.1(a), a preliminary issue under section 9A of the Civil Procedure Code ('Code') was framed therein. The said suit came to be dismissed, holding it to be barred in view of the provisions of Benami Transactions (Prohibition) Act, 1988 and Limitation Act, 1963. Defendant No.1(b) has assailed the said decree in Appeal No. 517 of 2005, which is stated to be subjudice.

9. The aforesaid proceedings indicate that there is a dispute about the succession to the estate of the deceased Gopal. The defendant No.1(a) has propounded a Will. The defendant No.1(c) has propounded another Will. The defendant No.1(b) claims that there was a family arrangement, under which the estate of the deceased Gopal was to be distributed. In the backdrop of aforesaid litigation, the defendant No.1(c) and 1(b) are opposing the withdrawal of the suit and the counterclaim on the premise that, in the event, the suit and the counterclaim are allowed to be withdrawn, the defendant No.1(b) and 1(c) would suffer irreparable loss as the defendant No.1(a) is not legally entitled to enter into any composition on behalf the of defendant No.3-Company. In view of the interim orders passed by this Court, the defendant No.3-Company was deprived of the right to develop the suit property. To address the loss which would be caused to defendant No.3-Company, the Supreme Court had directed the plaintiff to furnish the security to the tune of Rs. 200 crores. It is the case of the plaintiff that the defendant No.1 was the alter-ego of defendant No.3-Company. Thus, in the order passed by the Supreme Court also, the plaintiff was directed to furnish security to compensate the loss which would be caused to defendant No.1-Gopal and defendant No.3-Ferani.

It is contended that as the very claim of defendant No.1(a) of being the exclusive owner of the defendant No.3-Company is put in contest, the withdrawal of the suit and counterclaim, which would inevitably result in refund of the amount deposited by the plaintiff, in this Court, and the discharge of the security to the tune of Rs. 200 crores, would cause serious prejudice to the estate of the deceased Gopal and, in turn, the defendant Nos.1(b) and 1(c). Since the counterclaim was filed by defendant No.3 for the benefit of deceased Gopal as well, the defendant No.1(a), against whom proceedings were instituted by the deceased Gopal during his lifetime, and a number of proceedings challenging his right and entitlement qua Ferani are subjudice, the defendant No.1(a) cannot be permitted to withdraw the counterclaim.

10. The plaintiff, defendant No.1(a) and defendant No.3 have filed affidavits in reply in opposition to the prayers by the defendant No.1(c) in the interim applications. It may not be necessary to note the grounds of objection raised by the plaintiff, defendant No.1(a) and defendant No.3, distinctly. The substance of the defences, as raised by the plaintiff, defendant no.1(a) and defendant No.3, is that since the plaintiff and defendant No.3 are seeking withdrawal of the suit and counterclaim, unconditionally, the plaintiff and defendant No.3 are well within their rights to withdraw the suit and the counterclaim, respectively. The proceedings being withdrawn unconditionally, the defendants cannot have any objection, save and except, for costs. It is further contended that the prayers of defendant No.1(c) are misconceived. The counterclaim was instituted by defendant No.3-Company alone. The deceased defendant No.1 Gopal had not filed any counterclaim. Nor the legal representatives of the deceased Gopal, after they were impleaded as party defendants to the suit, have filed any counterclaim. The defendant No.3, being a juristic entity, has independent existence from that of its shareholders. As the deceased defendant No.1-Gopal, on his part, had asserted that he has no concern with defendant No.3-Company, by filing an affidavit and also written statement, the claim of the defendant No.1(c) that the defendant No.3-Company was, in fact, owned and controlled by the deceased Gopal is contrary to the pleadings of Gopal. The defendant No.3 has further asserted that the composition of the dispute with the plaintiff is in the interest of defendant No.3 as the restraint on development of the property to the extent of 21.42% share of the plaintiff would be removed once the suit and the counterclaim are allowed to be withdrawn. On these, amongst the other grounds, the plaintiff, defendant No.1(a) and the defendant No.3 have prayed that the applications be dismissed.

11. I have heard Shri Chirag Mody, the learned counsel for the defendant No.1(c)-applicant, Shri Virag Tulzapurkar, the learned Senior Advocate for plaintiff and Shri D.J. Khambatta, the learned senior counsel for defendant No.3-Ferani, at some length. Perused the pleadings in the suit, the counterclaim, the interim applications, affidavits in reply and rejoinder thereto and the material on record.

12. At the outset, it is imperative to note the nature of the suit instituted by the plaintiff. The suit proceeds on the premise that there was an arrangement between the plaintiff and his brothers, in respect of the properties which were to be acquired from F.E. Dinshaw Trust. Eventually properties were so acquired. The plaintiff had 21.42 % interest in the suit properties. The properties were divided in two lots. In the first lot, the plaintiff was given the specified 21.42 % share. The share proportionate to the interest of 21.42 % was not given in the properties described in the second lot. Hence, the suit for specific performance and injunctive reliefs as the defendants threatened to develop the suit properties to the exclusion of the plaintiff. As indicted above, this Court while passing an order of status-quo had directed the plaintiff to deposit the amount proportionate to the share claimed in the suit properties, i.e., 21.42%. The plaintiff has deposited the amount of Rs. 16,40,00,000/-.

13. As regards the prayer of the applicant, to restrain the plaintiff even from withdrawing the said amount of Rs.16,40,00,000/- also, the following aspects are of determinative significance. One, the amount was directed to be deposited to vouch for the readiness and willingness on the part of the plaintiff to perform his share of the obligation, in the nature of the costs incurred for acquisition of the properties. The said amount was not directed to be deposited to ensure that in the event the claim of the plaintiff is found unacceptable and the suit is eventually dismissed, the defendants could be compensated, out of the said amount, for any loss or damage on account of the institution of the suit. Once, the plaintiff seeks permission to withdraw the suit, it implies that the plaintiff does not any more seek the specific performance of the agreement. Consequently the plaintiff cannot be restrained from withdrawing the said amount.

14. The learned counsel for the defendant No.1(c) urged that the instant prayer for withdrawal of the suit and the counterclaim is not simplicitor unconditional withdrawal of the proceedings. The draft consent terms to be executed between the plaintiff and the defendant Non.3, which were shared with the defendant No.1(c), were pressed in to service demonstrate that the plaintiff and defendant No.3 have arrived at a settlement out of court to the prejudice of the rights of the defendant No.1(b), 1(c) and estate of the deceased Gopal. Even if the case of defendant No.1(c) is taken at par, that there is some understanding arrived at between the plaintiff and defendant No.3, yet the fact that the amount of Rs. 16,40,00,000/- was deposited by the plaintiff only to show his readiness and willingness cannot be lost sight of. Consequently, once the plaintiff intends to abandon the claim for specific performance, the plaintiff cannot be kept away from the amount so deposited. This leads me to the crucial question of withdrawal of suit which would result in releasing the security of Rs. 200 crores furnished by the plaintiff.

15. Shri Tulzapurkar, the learned Senior Counsel for the plaintiff urged with a degree of vehemence that the plaintiff has an unfettered right to withdraw the suit. The plaintiff is not seeking any liberty to institute a fresh suit, as envisaged by Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908 ('Code'). The defendants, thus, cannot object the withdrawal of the suit, except for the payment of costs incurred by the defendants in defending the suit.

16. To bolster up this submission, the learned Senior Counsel placed a strong reliance on a judgment of the Supreme Court in the case of ***Anil Kumar Singh Vs. Vijay Pal Singh & Others [1].*** In the said case, after adverting to the distinction between Sub-rule (1) and Sub-rule (3) of Rule 1

1 AIR 2017 SC 5587

of Order XXIII, the Supreme Court enunciated the legal position as under :

> *“24) In our considered opinion, when the plaintiff files an application under Order XXIII Rule 1 and prays for permission to withdraw the suit, whether in full or part, he is always at liberty to do so and in such case, the defendant has no right to raise any objection to such prayer being made by the plaintiff except to ask for payment of the cost to him by the plaintiff as provided in sub-rule (4).*
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> *25) The reason is that while making a prayer to withdraw the suit under Rule 1(1), the plaintiff does not ask for any leave to file a fresh suit on the same subject matter. A mere withdrawal of the suit without asking for anything more can, therefore, be always permitted. In other words, the defendant has no right to compel the plaintiff to prosecute the suit by opposing the withdrawal of suit sought by the plaintiff except to claim the cost for filing a suit against him.*
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> *26) However, when the plaintiff applies for withdrawal of the suit along with a prayer to grant him permission to file a fresh suit on the same subject matter as provided in sub-rule (3) of Rule 1 then in such event, the defendant can object to such prayer made by the plaintiff. In such event, it is for the Court to decide as to whether the permission to seek withdrawal of the suit should be granted to the plaintiff and, if so, on what terms as provided in sub-rule (3) of Rule 1.”*

17. Reliance was also placed on a judgment of this Court in the case of ***Anil Dinmani Shankar Joshi And another Vs. Chief Officer, Panvel Municipal Council. Panvel & another*** [2] , wherein a learned Single Judge of this Court, after adverting to the provisions contained in Order XXIII Rule 1 of the Code and pronouncement of the Supreme Court in the case of ***Shiv Prasad Vs. Durga Prasad*** [3] has observed that every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not

2 AIR 2003 Bombay 238
3 (1975) 1 SCC 405

dependent on the order of the Court.

18. Banking upon the aforesaid observations, Shri Tulzapurkar would submit that the insistence of the applicant to disallow the permission of withdrawal of the suit is only with a view to continue the security, which was directed to be furnished by the plaintiff to take care of the contingency of loss which may be suffered by the defendants, in the event the notice of motion was finally dismissed. Since the said order was in the nature of an interim order in aid of the main relief which may be granted after adjudication of the loss or damage to the defendants, the said arrangement cannot be continued in perpetuity when the defendant No.1(c) has no crystallized right in the affairs of defendant No.3-Company, urged Shri Tulzapurkar.

19. To lend support to the aforesaid submission, the Shri Tulzapurkar placed a strong reliance on a judgment of the Supreme Court in the case of ***Shipping Corporation of India Ltd. Vs. Machado Brothers & Ors.***[4] In the said case, the courts below had refused the permission to withdraw the suit as an objection was raised therein that the interlocutory order which was passed therein would stand vacated, and thus, the plaintiff would not be entitled to withdraw the suit. The observations of the Supreme Court in the paragraph Nos.27 and 28 are of significance. They read as under :

4 AIR 2004 SC 2093

> *"27 While dismissing the application I.A.No.20651/2001 the courts below proceeded not on the basis that the original notice of termination has not become infructuous, but on the basis that the said application lacks in bona fide and if the said application is allowed the interlocutory injunction hitherto enjoyed by the plaintiff will get vacated and consequently the plaintiff will be prejudiced. The question for our consideration now is whether such ground can be considered as valid and legal. While so considering the said question one basic principle that should be borne in mind is that interlocutory orders are made in aid of final orders and not vice versa. No interlocutory order will survive after the original proceeding comes to an end. This is a well established principle in law as could be seen from the judgment of this Court in Kavita Trehan (Mrs.) & Anr. vs. Balsara Hygiene Products Ltd. (1994 5 SCC 380) wherein it is held :*
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> > *"Upon dismissal of the suit, the interlocutory order stood set aside and that whatever was done to upset the status quo, was required to be undone to the extent possible."*
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> *28 Therefore, in our opinion, the courts below erred in continuing an infructuous suit just to keep the interlocutory order alive which in a manner of speaking amounts to putting the cart before the dead horse."*

20. Shri Mody, the learned counsel for the applicant, joined the issue by canvassing a submission that the right of a party to withdraw the proceeding is not unbridled. Where a right is accrued to the opponent, during the pendency of a proceeding, the first party cannot defeat the right so accrued to the opponent by seeking withdrawal of the proceeding. To bolster up this submission, Shri Mody placed a strong reliance on a judgment of the Supreme Court in the case of ***Sneh Gupta Vs. Devi***

Sarup & Ors. [5]. In the said case, which has its genesis in the entitlement of the parties to succeed to the estate of the predecessor-in-title under Hindu Succession Act, 1956, the Supreme Court has observed it is well well known that a suit cannot be withdrawn by a party after it acquires a privilege. The right of the plaintiff to withdraw the suit would be unqualified, provided no right has been vested in the other party. The Supreme Court has expounded the legal position in the following terms :-

> *"34 It is also well known that a suit cannot be withdrawn by a party after he acquires a privilege. In R. Ramamurthy Ayer v. Raja V. Rajeswara Rao [(1972) 2 SCC 721], this Court held :*
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> > *"12. Coming back to the question of withdrawal of a suit in which the provisions of Sections 2 and 3 of the Partition Act have been invoked we find it difficult to accede to the contention of the appellant that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under Section 2 of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff under Section 3. In England the position about withdrawal has been stated thus, in the Supreme Court Practice, 1970 at p. 334:*
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> > *"Before Judgment.-- Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly dominus litis or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him."*
>
> *As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under Section 3 of the Partition Act he obtains an advantage in that the court is bound thereafter to order a valuation and after getting the same done to offer to sell the same to such shareholder at the valuation so made. This advantage, which may or may not fulfil the juridical*

5 (2009) 6 SCC 194

meaning of a right, is nevertheless a privilege or a benefit which the law confers on the shareholder. If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of Section 3(1) it would only enable the plaintiff to defeat the purpose of Section 3(1) and also to deprive the defendant of the above option or privilege which he has obtained by the plaintiff initially requesting the court to sell the property under Section 2 instead of partitioning it. Apart from these considerations it would also enable the plaintiff in a partition suit to withdraw that suit and defeat the defendant's claim which, according to Crump J., cannot be done even in a suit where the provisions of the Partition Act have not been invoked."

34 Yet again in R. Rathinavel Chettiar v. V. Sivaraman [(1999) 4 SCC 89], this Court, stated the law, thus :

> *"22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained."*

35 A right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party. [See Bijayananda Patnaik v. Satrughna Sahu and Ors. [(1964) 2 SCR 538] and Hulas Rai Baij Nath v. Firm K.B. Bass & Co. [(1967) 3 SCR 886]. "

21. The question which thus wrenches to the fore is whether any right is vested in defendant No.1(c) and 1(b), or for that matter, the deceased defendant –Gopal, in view of the order passed by the Supreme Court and/

or the proceedings taken hitherto. The edifice of the claim of defendant No.1(a) is that the deceased Gopal was the absolute and real owner of the defendant No.3. The Supreme Court had passed a specific direction to furnish security to cover the losses which the defendant Nos.1 and 3 would suffer in the event the notice of motion is eventually dismissed. The defendant no.3, on account of the pendency of the proceedings and the resultant restraint in view of the orders passed by this Court, suffered loss as it was prevented from developing the property.

22. In opposition to this, it was strenuously submitted on behalf of the plaintiff and defendant No.3 that the deceased Gopal had, in his written statement as well as in the affidavit in reply to the notice of motion, categorically contended that he had not concern whatsoever with the defendant No.3 Company. Attention of the court was invited to the contentions in the written statement, to the effect that “the defendant No.1 (deceased Gopal) states and submits that the defendant No.3 does not have any right, title or interest in the suit property, the defendant does not have any share in the suit property and the defendant denies that he is effectively in control of defendant No.3 or that defendant No.3 is his alter ego or a means/entity through which the defendant carries on his business as alleged or otherwise”.

23. Shri Mody, the learned counsel for the applicant urged that these pleadings are required to be construed in the context of time and the subsequent developments. Those assertions were made by the deceased defendant No.2-Gopal before the dispute between Gopal and defendant No.1A had commenced. They were raised by the defendant No.1, when the dispute was between the brothers of defendant No.1. Subsequently, when the defendant No.1(a) usurped the control of the companies, including defendant No.3, the deceased Gopal had instituted proceedings, asserting his right and interest in the companies, including defendant No.3. Therefore, the said contention of deceased defendant No.1 Gopal cannot be pressed into service to impair the claim of defendant No.1(c).

24. I find it rather difficult to accede to this submission. It is pertinent to note that the defendant No.1(a) to 1(c) came to be impleaded as legal representatives of deceased defendant No.1-Gopal. In view of the provisions contained in Order XXII Rule 4(2) of the Code, a person who is made a party to the proceedings in the capacity of the legal representatives of the deceased defendant, is entitled to take any defence appropriate to his character as legal representative of the deceased defendant. The record does not indicate that after the defendant Nos.1(a) to 1(c) were impleaded, the defendant Nos.1(a) to 1(c) asserted their right to be impleaded in their independent capacity and took a stand which is at variance with the defence raised by deceased defendant No.1. In law, the legal representative is not permitted to take a defence which is contrary to or at variance with the pleadings of the deceased defendant, unless the legal representative seeks impleadment in the suit in his own right. Thus, at this stage juncture, it is too late in the day for the defendant No.1(c) to assert that the defendant Nos.1(a) to 1(c), are not bound by the pleadings in the written statement of the deceased defendant No.1.

25. This propels me to the consideration of the nature of, and the circumstances in which, the counterclaim came to be filed by the defendant No.3. To start with, the counterclaim was contingent upon the claim of the defendant No.3 that in the event, the suit is dismissed, the plaintiff be ordered to pay the defendant No.3 a sum of Rs.500 crores by way of damages and/or compensation. The counterclaim was instituted by defendant No.3 alone. The defendant No.1(a) has signed and verified the counterclaim in the capacity of the director of defendant No.3. The record does not indicate that the defendant No.1(c) or 1(b) got themselves impleaded as the party defendants to the said counterclaim.

26. The claim of the defendant No.1(c), on the contrary, rests on the premise that the deceased Gopal had absolute control and ownership over the defendant No.3 and defendant No.1(a) has unlawfully usurped the control thereof. If the proceedings, to which a reference has been made initially, are taken into account, it becomes evident that the right and entitlement of the defendant Nos.1(b) and 1(c) over the estate of the deceased Gopal, to the exclusion of defendant No.1(a), is a matter which warrants adjudication. In the context of the present proceedings, the defendant No.1(c) claims that the applicant has, at least, approximately

50% shares in the defendant No.3-Company.

27. The learned counsel for the plaintiff and defendant No.3, in the backdrop of the aforesaid claim of the defendant No.1(c), urged that, at best, the claim of the applicant is to have her name entered in the register of the shareholders. Even if it is assumed that the defendant No.1(c) is a shareholder of the defendant No.3-Company yet it does not give the applicant any interest in the property and assets of defendant No.3.

28. The learned counsels for the plaintiff and defendant No.3 were, in unison, in placing reliance on the judgment of the Supreme Court in the case of ***Bacha F. Guzdar, Bombay Vs. Commissioner of Income Tax, Bombay* [6]*,*** wherein it was *inter-alia,* enunciated that the company is a juristic person and is distinct from the shareholders. It is the company which owns the property and not the shareholders. The true position of a shareholder is that on buying shares an investor becomes entitled to participate in the profits of the company in which he holds the shares if and when the company declares, subject to the Articles of Association, that the profits or any portion thereof should be distributed by way of dividends among the shareholders. He has undoubtedly a further right to participate in the assets of the company which would be left over after winding up, but not in the assets as a whole as Lord Anderson puts it.

6 (1955) 1 SCR 876

29. In view of the aforesaid exposition of the legal position as regards the rights of a shareholder, the applicant herein has to surmount a formidable legal challenge to her claim that she may seek transposition as a plaintiff in the counterclaim instituted by the defendant No.3 Company. As indicated above, the claim of the applicant that the deceased Gopal [and, in turn, on the basis of the Will propounded by the applicant, the legatees of the deceased Gopal, to the exclusion of defendant No.1(a)] have absolute title and interest to the shares of defendant No.3, is a matter for adjudication. The rights are yet to be crystalized.

30. In the circumstances, the defendant No.3-Company, which is indisputably a separate juristic entity, cannot be restrained from taking a decision, as regards the proceedings which it considers to be appropriate, and in the best interest of the Company. The submission on behalf of the applicant that the withdrawal of the suit and counterclaim is not simplicitor withdrawal and there is some settlement between the plaintiff and defendant No.3, viewed through this legal prism, looses significance.

31. The applicant cannot said to be remediless. In the pending proceedings, the applicant can very well make a claim that the composition of the instant dispute by defendant No.1(a), in the capacity of the director of defendant No.3, caused loss to the estate of the deceased Gopal and claim the appropriate reliefs. Then, it would be a matter for adjudication. The submission on behalf of the applicants that they would be deprived of the opportunity to agitate the issue as the composition may restrain them from agitating the same is thus unfounded.

32. The conspectus of the aforesaid consideration is that the plaintiff and the defendant No.3, in law, have an unfettered right to seek withdrawal of the suit and the counterclaim. The material on record does not indicate that any vested right has accrued to the applicant. Secondly, the counterclaim was instituted by the defendant No.3 Company which is a separate juristic entity. Even if the case of the applicant is taken at par, the applicant, in the capacity of the shareholder of defendant No.3-Company, cannot seek to restrain the Company from exercising the option of withdrawing from the proceedings. Lastly, the fact that during his lifetime, the defendant No.1 had claimed that he had no concern with the defendant No.3 Company, so far as this proceedings is concerned, seals the issue.

33. Thus, the prayer of the applicant to restrain the plaintiff from withdrawing the suit and also the defendant No.3 from withdrawing the counterclaim, and that of the plaintiff of seeking the release of the amount deposited by the plaintiff and the discharge of the security, does not merit countenance. The applications therefore deserve to be rejected.

34. Hence, the following order:

(i) Interim Application Nos. 1 of 2019 and 2 of 2019 in Suit stand dismissed.

(ii) Interim Application Nos. 1 of 2019 and 2 of 2019 in counterclaim stand dismissed.

(iii) The plaintiff is permitted to withdraw the suit.

The amount of Rs.16,40,00,000/- deposited by the plaintiff be refunded to the plaintiff along with accrued interest thereon.

(iv) The bank guarantee furnished by the plaintiff to provide security to the tune of Rs. 200 crores be released/cancelled.

(v) The defendant No.3 is permitted to withdraw the counterclaim.

(vi) The plaintiff shall pay the costs incurred upto today by the defendant No.1(b) and 1(c), including the costs incurred by the deceased defendant No.1, to defendant No.1(b) and 1(c).

(vii) The costs to be quantified by the Taxing Master.

(viii) The plaintiff and the defendant No.3 are entitled to refund of court fees, if any, as per rules.

(ix) Both the suit and the counterclaim stand disposed of.

(x) All pending applications accordingly stand disposed of.

35. At this stage, the learned counsel for the applicant seeks stay to the order passed by this court as the applicant is desirous of testing the legality, propriety and correctness of this order.

36. The learned counsel of the applicant strongly opposes the prayer for stay as it would entail that the plaintiff would be required to keep alive the bank guarantee to secure the amount of Rs.200 crores.

37. In view of the reasons recorded by this Court, in this order, the prayer for further stay does not seem justifiable. However, in the event, this order is set aside by the Appeal Court and the suit and counterclaim are restored to file, the applicant ought to be restored to the position which obtained before passing of this order. In that event, the plaintiff must undertake to furnish the security to the tune of Rs.200 crores, before the bank guarantee is released.

38. The learned counsel for the plaintiff submits that the plaintiff is present in Court and the plaintiff is ready and willing to furnish the aforesaid undertaking.

39. In the aforesaid backdrop, the bank guarantee be released by the Prothonotary and Senior Master, after the plaintiff furnishes an undertaking to the Court that, in the event, this order is set aside and the suit and the counterclaim are restored to file, the plaintiff would furnish security, in the nature of bank guarantee to the tune of Rs.200 crores to the satisfaction of the Prothonotary and Senior Master.

40. In view of the above, the oral application praying stay to the order stands rejected, subject to the aforesaid directions for furnishing the undertaking.

[N.J. JAMADAR, J.]