

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

% **Date of decision: 5th May, 2020**

+ **RSA No.242/2005.**

BALDEV SINGH & ORS

..... Appellants

Through: Mr. Manish Makhija & Mr. Kailash
Pandey, Advs.

Versus

RAM CHANDER & ORS

..... Respondents

Through: Mr. Keshav Dayal, Sr. Adv. with Ms.
Geeta Mehrotra, Advs. for 4(i) and
4(ii).

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

1. This Regular Second Appeal under Section 100 of the Code of Civil Procedure, 1908 (CPC) impugns the judgment and decree [dated 22nd March, 2004 of the Court of Shri O.P. Gupta, Additional District Judge (ADJ), Delhi in RCA No.25/1993 (Old No.150/82)] allowing the Regular First Appeal under Section 96 of the CPC preferred by the respondents/plaintiffs against the judgment and decree [dated 22nd July, 1982 of the Court of Shri S.K. Tandon, Sub-Judge, First Class in Suit No.1166/1972 (filed in the year 1969)] of dismissal of the suit filed by the respondents/plaintiffs for ejectment of the appellants/defendants from immovable property, and axiomatically passing a decree in favour of respondents/plaintiffs and against the appellants/defendants of ejectment of the appellants/defendants from plots no.2 to 6 and 8 to 10 along with superstructure thereon, as shown in red colour in the site plan Ex.PW4/1, situated in Khasra No.71, Village Humayunpur, Delhi.

2. This appeal along with an application for condonation of delay in filing thereof came up first before this Court on 29th August, 2005 when, without considering whether the appeal entailed any substantial question of law, which is the *sine qua non* for entertaining or admitting a Second Appeal, notice of the application for condonation of delay in preferring the appeal was issued. Vide subsequent order dated 31st January, 2006, the execution proceedings were stayed.

3. Before even the application for condonation of delay in preferring the appeal could be considered, applications for substitution of legal representatives of the parties to the appeal and an application for impleadment as a party to the appeal came to be filed and which delayed adjudication even of the aspect of condonation of delay in preferring the appeal. Finally, vide order dated 25th November, 2016, the delay in filing and re-filing this appeal was condoned and the appeal listed for consideration. However, applications continued to be filed, and on none of the subsequent dates also, notice of the appeal was issued or it was recorded that this Second Appeal entailed any substantial question of law. However the counsel/s for some of the respondents/plaintiffs, to whom notice of applications were issued, have been appearing.

4. The appeal at that stage came up before the undersigned on 10th July, 2018 when counsel for the appellants/defendants and the senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs appeared; none appeared for any of the other respondents/plaintiffs. The counsels were heard at length on that date and substantial part of this judgment also dictated in open Court on that date. However on request of the senior counsel for the respondents no.4(i)

and 4(ii)/plaintiffs that he wanted to address further arguments, the matter was adjourned to the next day, recording that judgment already dictated shall be finalized after completion of the hearing. On the next day i.e 11th July, 2018 the counsel for the respondents no.4(i) and 4(ii)/plaintiffs stated that she wanted to argue further at length on facts and the senior counsel will argue further on the legal aspects only and the counsels were heard further but due to paucity of time the further hearing adjourned to 12th July, 2018. On 12th July, 2018 the matter was taken up at the fag end of the day and though hearing could be completed but judgment already dictated on 10th July, 2018 could not be finalized and the file was sent to the Chamber for finalizing the judgment and which remained to be done and this judgment is being pronounced now.

5. The suit, from which this appeal arises, was filed, as far back as on 24th May, 1969, by (A) Ram Chander, (B) Indro Devi, (C) Pushpa Devi, and, (D) Saraswati Devi against (a) Babu Ram, (b) Misri Devi, (c) Kaushalya Wanti, (d) Krishna Wanti, (e) Khushbakhat Rai, (f) Nand Rani, (g) Anand Prakash, (h) Rajinder Singh, (i) Sadhu Singh, (j) Hari Singh, son of Amar Singh, and, (k) Hari Singh, son of Harnam Singh, for ejectment from immovable property being plots no.2 to 6 and 8 to 10, as shown in the read colour in the site plan filed with the plaint, situated in Khasra no.71 Village Humayunpur, Delhi and for *mesne profits* and injunction, pleading:

- (i) that Kali Ram, being the maternal grandfather of plaintiff no.1 Ram Chander, was owner of 8 Bighas 1 Biswa of land situated in Khasra No.71, Village Humayunpur, Delhi; he leased out the said land to Munshi Ram on the terms and conditions contained

in the registered Lease Deed dated 20th May, 1948, for a period of 20 years commencing from 20th May, 1948;

- (ii) that Munshi Ram, as lessee was entitled to construct *kuchha* and *pucca* house/s on the said land and to transfer the lease hold rights, title and interest in the said land by way of sale, mortgage, gift or otherwise;
- (iii) that the rent agreed to be paid was Rs.400/- per annum and the lease was renewable for a further period of 20 years on the same terms and conditions, at the option of the lessee Munshi Ram;
- (iv) that out of the aforesaid 8 Bighas 1 Biswa of land, the lessee Munshi Ram vide Deeds dated 9th February, 1949 sublet the land measuring 3 Bighas to (a) Gopal Das, (b) Om Prakash, and (c) Ved Prakash;
- (v) that Gopal Das, Om Prakash and Ved Prakash developed the said 3 Bighas of land into ten residential plots, leaving some land for roads and the said plots were numbered as 1 to 10 and were shown in the site plan filed with the plaint;
- (vi) that Gopal Das, Om Prakash and Ved Prakash thereafter, vide Sale Deed dated 16th May, 1952 sold their sub lease right, title and interest in the ten plots of land so developed by them in favour of the persons mentioned below and who have constructed on the said plots and which have been given municipal numbers, also shown below:

Plot No.	Municipal No.	Sold to
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1	105	Pushpa Devi
2	Unbuilt	Kaushalya Wanti, defendant no.3
3	106	Krishna Wanti, defendant no.4
4	107	Khushbakhat Rai, defendant no.5
5	110	Nand Rani, defendant no.6
6	109	Anand Prakash, defendant no.7 and Rajinder Singh, defendant no.8
7	112	Sardar Bawa Singh
8	111	Sardar Sadhu Singh, defendant no.9
9	113	Hari Singh, son of Amar Singh, defendant no.10
10	113A	Hari Singh, son of Harnam Singh, defendant no.11

- (vii) that Munshi Ram died in May, 1950 or thereabout, leaving behind the defendants no.1 and 2 viz. Babu Ram and Misri Devi as his heirs;
- (viii) that the defendants no.1 and 2 Babu Ram and Misri Devi sold their leasehold rights in another 3 Bighas 1 Biswa of land aforesaid to Shanti Devi;
- (ix) that Kali Ram sold his right, title and interest in the said 3 Bighas 1 Biswa of land to Hans Raj;
- (x) that thus Kali Ram remained owner only of 5 Bighas of land;
- (xi) that Kali Ram died bequeathing the 5 Bighas of land aforesaid to the plaintiff no.1 Ram Chander and thus Ram Chander became absolute owner of 5 Bighas of land aforesaid;

(xii) that the plaintiff no.1 Ram Chander sold 2 Bighas out of 5 Bighas of land aforesaid to various persons and remained the owner of only 3 Bighas of the aforesaid land which had been sublet to Gopal Das, Om Prakash and Ved Prakash and who in turn had transferred their leasehold rights to the defendants no.3 to 11 and to Pushpa Devi and Sardar Bawa Singh;

(xiii) that plaintiff no.1 Ram Chander sold his ownership rights in plot no.1 to Sukh Ram, husband of plaintiff no.3 Pushpa Devi and in plot no.7 to Sardar Bawa Singh's wife Chanan Kaur; in this view the plaintiff no.1 Ram Chander remained the owner only of plots no.2 to 6 and 8 to 10 aforesaid and the defendants aforesaid in occupation thereof were lessees under the plaintiff no.1 Ram Chander with respect thereto;

(xiv) that thus the position with respect to plots no.2 to 6 and 8 to 10 was as under:

"Plot No.	Landlord	Tenants	Sub-Tenant
2	Plaintiff No.1	Defendants 1&2	Smt. Kaushalya Wanti defendant No.3
3	-do-	-do-	Smt. Krishnawanti defendant No.4.
4	-do-	-do-	Sh. Khushbakhat Rai defendant No.5
5	-do-	-do-	Smt. Nand Rani defendant No.6.
6	-do-	-do-	Sh. Anand Parkash Defendant No.7 Sh. Rajinder Singh defendant No.8.
8	-do-	-do-	Sh. Sadhu Singh defendant no.9
9	-do-	-do-	Sh. Hari Singh defendant No.10

10	-do-	-do-	Sh. Hari Singh defendant No.11”
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(xv) that the plaintiff no.1 Ram Chander vide Sale Deed dated 24th April, 1969 sold his right, title and interest in plot no.2 aforesaid in favour of plaintiffs no.2 to 4 Indro Devi, Pushpa Devi and Saraswati Devi; and,

(xvi) that the original Lease Deed dated 20th May, 1948 expired on 19th May, 1968 and the defendants were liable to be ejected from the property.

6. Considering the limited aspect to which the counsel for the appellants confined his arguments, need to detail the stand taken by the defendants in their written statement is not felt. Suffice it is to state that on the pleadings of the parties, the following issues were framed in the suit on 14th May, 1970:

- “i) Whether the suit is liable to be stayed U/s 10 read with Sec. 151 CPC? O.P.D.
- ii) Whether Dhuppan is a necessary party to the suit? O.P.D.
- iii) Whether the suit is bad for multi-ariousness? O.P.D.
- iv) Whether the Civil Court has no jurisdiction to entertain and try the suit? O.P.D.
- v) Whether the suit is not maintainable without obtaining Probate and Letter of Administration of the Will? O.P.D.
- vi) Whether the suit is incompetent for want of notice U/s 106 of Transfer of Property Act? O.P.D.
- vii) Whether the suit has been properly valued for the purposes of court fee and jurisdiction? O.P.D.

- viii) Whether the suit is bad for being for partial ejectment from the tenanted premises? O.P.D.
- ix) Whether the plaintiffs are the owners of the suit property as being heirs of Kali Ram, deceased? O.P.P.
- x) Whether the plaintiffs are entitled to recover mesne profits? If so, at what rate and what amount? O.P.P.
- xi) Whether the plaintiff is entitled to the relief of injunction claimed? O.P.P.
- xii) Relief.”

and the parties relegated to evidence.

7. The Suit Court decided all the aforesaid issues, save issue no.(vi) supra, in favour of the respondents/plaintiff; however in view of issue no.(vi) supra being decided against the respondents/plaintiffs, the suit was dismissed.

8. First Appeal was preferred by the respondents/plaintiffs against the judgment and decree of dismissal of suit. The counsel for the respondents no.4(i) and 4(ii) on enquiry stated that cross-objections were preferred to the appeal filed by the plaintiffs by some of the defendants against the findings of the Suit Court in so far as against the defendants and which were ordered to be separately numbered as appeals but which appeals/cross-objections were not pursued.

9. The First Appellate Court was thus concerned only about the correctness of the finding returned by the Suit Court on issue no.(vi) aforesaid. While the Suit Court had held that the respondents/plaintiffs had not determined the tenancy created vide Lease Deed dated 20th May, 1948, the First Appellate Court held that since it was a lease for a fixed period and on expiry of which period the lease had not been renewed, there was no need

for a notice under Section 106 of the Transfer of Property Act, 1882 and accordingly decided issue no.(vi) aforesaid also in favour of the respondents/plaintiffs and resultantly decreed the suit.

10. The limited argument of the counsel for appellants/defendants in this Second Appeal is, (i) that as per the case in the plaint, the 3 Bigha of land qua which the lease remained under the plaintiffs, had been sub-divided into 10 plots and of which 10 plots, the plaintiff no.1 Ram Chander claimed to be the owner/landlord only of plots No.3 to 6 and 8 to 10 and the plaintiffs no.2 to 4 were stated to be the owner/landlord of plot no.2 and the ownership rights in plots no.1 and 7 had been sold; (ii) that Ram Chander, during the pendency of the First Appeal, filed an application withdrawing the appeal, claiming that he had executed Agreements to Sell, Power of Attorney, Will etc. with respect to his ownership rights in plots no.3 to 6 and 8 to 10 in favour of the respective lessees thereof; (iii) that however since no order was made on the said application, another application for withdrawal from the appeal under Order XXIII Rule 1 of the CPC was filed; (iv) that pursuant thereto the plaintiff no.1 Ram Chander who in the First Appeal was appellant no.1, was transposed as respondent no.12 in the First Appeal; and, (v) that the learned ADJ, while allowing the appeal and passing the decree for ejectment, also passed a decree for ejectment in favour of the plaintiff no.1 Ram Chander and with respect to plots no.3 to 6 and 8 to 10, when the plaintiff no.1 Ram Chander had already withdrawn the appeal. It is thus argued that the order of the First Appellate Court is erroneous and liable to be set aside for the said reason. It is also informed that though during the pendency of the First Appeal, an application was filed by one Ratni Devi for substitution as legal heir of plaintiff no.1 Ram Chander and was so

substituted but it subsequently transpired that plaintiff no.1 Ram Chander was alive till the decision of the First Appeal; accordingly, plaintiff no.1 Ram Chander was impleaded as respondent no.1 to this appeal and has died during the pendency of this appeal and vide order dated 30th November, 2011 his heirs other than Ratni Devi have been substituted.

11. The senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs, being two of the heirs of original plaintiff no.4 Saraswati Devi, argued, (a) that the appellants Baldev Singh and Gurdial Singh who alone are pursuing this appeal as heirs of Sadhu Singh are not entitled to do so being only two of the heirs of Sadhu Singh and the other heirs of Sadhu Singh having not chosen to pursue the appeal; (b) that though plaintiff no.1 Ram Chander had filed two applications under Order XXIII Rule 1 of the CPC before the First Appellate Court for withdrawal of the appeal insofar as by the said plaintiff no.1 Ram Chander but no order was made on the said applications of dismissal of the appeal preferred by plaintiff no.1 Ram Chander; (c) that thus the First Appeal by plaintiff no.1 Ram Chander remained and did not stand withdrawn; (d) that the plaintiffs no.2 to 4 who were appellants no.2 to 4 in the First Appeal, opposed the withdrawal of the appeal by plaintiff no.1 Ram Chander and it is for this reason only that no order was made on the application of plaintiff no.1 Ram Chander for withdrawal of First Appeal and he was transposed as respondent no.12; (e) that thus the appeal by plaintiff no.1 Ram Chander remained and the First Appellate Court has, while setting aside the judgment and decree of the Suit Court, rightly passed the decree not only in favour of the plaintiffs no.2 to 4 but also in favour of original plaintiff no.1 Ram Chander; (f) that this appeal is not maintainable for non-impleadment of the original defendants no.1 and 2 who were the heirs of the

original lessees under the Lease Deed dated 20th May, 1948; (g) that the decree of the First Appellate Court, insofar as against the appellants Baldev Singh and Gurdial Singh, is an *ex parte* one and the said persons being *ex parte* before the First Appellate Court cannot maintain a Second Appeal; (h) that since the appellants Baldev Singh and Gurdial Singh have allowed the decree to attain finality qua other parties, they cannot challenge the decree in this appeal and which would result in inconsistent findings qua the persons against whom it has attained finality and against whom it is being decided today.

12. I enquired from the senior counsel for the respondents no.4(i) and 4(ii) namely Joginder Nath and Virender Nath, being the heirs of the original plaintiff no.4 Saraswati Devi, that since as per the plaint in the suit from which this appeal arises, the plaintiff no.4 Saraswati Devi along with plaintiffs no.2 and 3 Indro Devi and Pushpa Devi had interest only in plot no.2, how are they affected by the challenge by the appellants to the finding and decree of the First Appellate Court with respect to plots no.3 to 6 and 8 to 10.

13. The counsel for the appellants/defendants on enquiry stated that the appellants/defendants are not claiming relief only with respect to plots no.3 to 6 and 8 to 10 and not qua plot no.2 and the respondents Joginder Nath and Virender Nath, if at all entitled to the said plot no.2, are at liberty to execute the decree of the First Appellate Court with respect to plot no.2.

14. The senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs stated that plots no.3 to 6 and 8 to 10 were agreed by Ram Chander to be sold to one Ratni Devi and attorney executed in favour of Virender Nath. It

is stated that application for impleadment had been filed on behalf of Ratni Devi as successor in interest of Ram Chander. It is also contended that Ram Chander admitted execution of Agreement to Sell in favour of Ratni Devi in another suit, copy of written statement wherein was filed before the First Appellate Court.

15. However on enquiry it was informed that there was no order in the First Appellate Court for taking additional evidence and the written statement was not admitted into evidence.

16. The only question which thus arises for consideration in this Second Appeal is, the effect of filing of application by plaintiff no.1 Ram Chander as appellant in the First Appeal, for withdrawal of the First Appeal preferred by him jointly with plaintiffs no.2 to 4, against the judgment and decree of dismissal suit filed by the plaintiff no.1 Ram Chander together with plaintiffs no. 2 to 4 and the effect of, plaintiff no.1 Ram Chander in pursuance to the said applications being transposed as respondent in the First Appeal. The counsel for the appellants/defendants contends that the effect was that the First Appellate Court, while allowing the First Appeal could not have passed a decree qua that portion of the suit property in which plaintiff no.1 Ram Chander was interested. On the contrary the senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs contends that the decree had to be with respect to the entire property qua which the suit was filed, by arguing that since the First Appeal in so far as by plaintiff no.1 Ram Chander was not allowed to be withdrawn, decree had to be passed with respect to the entire property.

17. The senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs in support of his contentions referred to:

- (i) **J.K. Bhatia Vs. A.K. Bhatia** 144 (2007) DLT 28 holding that since Order XXIII Rule 1 (5) mandates that consent of co-plaintiffs for seeking withdrawal of suit or part thereof is mandatory, unless there is consent of other plaintiffs, withdrawal of suit on behalf of one plaintiff cannot take place.
- (ii) **Avenue Supermarts Private Limited Vs. Nischint Bhalla** (2016) 15 SCC 411 holding that once the matter has been finally decided so as to become conclusive between the parties to the suit in respect of subject matter of the suit with reference to which relief is sought, the suit cannot be permitted to be withdrawn at the appellate stage in as much as the same if allowed would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which had come into existence.

18. The senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs in support of his other contentions, of non-maintainability of the present appeal owing to the appellants being only two of the heirs of Sadhu Singh and the other heirs of Sadhu Singh having chosen not to pursue the appeal and of the appeal being not maintainable also for the reason of all the parties to the suit and the First Appeal having not been impleaded as parties hereto, relied on **Budh Ram Vs. Bansi** (2010) 11 SCC 476, **DDA Vs. Amarnath** 43 (1991) DLT 695, **Sudha Rani Vs. Postmaster General** (1999) 81 DLT 367, **Amit Kumar Shaw Vs. Farida Khatoon** (2005) 11 SCC 403.

19. I have considered the rival contentions as also whether the appeal raises any substantial question of law.

20. On first blush it appeared that in view of plaintiff no.1 Ram Chander in his applications for withdrawal of the First Appeal having admitted having executed Agreements to Sell, Power of Attorney, Will etc. in favour of lessees of plots no.3 to 6 and 8 to 10 with which only he was concerned and of which only he was the landlord, the First Appellate Court ought not to have passed a decree for ejectment with respect to the said plots and ought to have confined the decree for ejectment with respect to plot no.2 only with which plaintiffs no.2 to 4 were concerned and of which the plaintiffs no.2 to 4 were landlords. However on further consideration it is realized that the relationship of landlord and tenant between original plaintiff no.1 Ram Chander and the lessees of plots no.3 to 6 and 8 to 10 could not have come to an end merely on execution of agreement to sell even if any by the lessor Ram Chander in favour of the lessees of plots no.3 to 6 and 8 to 10 in as much as an agreement to sell only vests a right to seek specific performance thereof and does not create any right in property in favour of the agreement purchaser.

21. However before dealing with the said aspect I may deal with the contention of the senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs qua the very maintainability of the appeal. No merit is found in the contention that only some of the legal representative of a party to a litigation, on demise of such party cannot pursue the litigation without all the legal representatives of such party also agreeing thereto. Though some merit is found in the contention that in an appeal all the parties to the original

proceedings have to be joined but the said defect is not found to be such so as to merit dismissal of the appeal at this stage. However it is not deemed appropriate to discuss the said aspect in detail as otherwise also no merit is found in the only contention of the counsel for the appellants/defendants.

22. On the senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs referring to ***Avenue Supermarts Private Limited*** supra I had also enquired from him whether not for the law laid down therein to apply, it has to be shown that some right has vested in the defendant and whether not no right could be said to have vested in the appellants/defendants from the judgment of Suit Court of the dismissal of the suit. It was also enquired whether not ***Avenue Supermarts Private Limited*** itself also provides that the principle laid down therein to be not absolute. The reliance on the said judgment in the facts of the present case is found to be misconceived.

23. My research on the contention of the counsel for the appellants/defendants, that the First Appeal by plaintiff no.1 Ram Chander stood withdrawn on filing of application and the resultant incapability of the First Appellate Court to pass a decree for ejectment with respect to plots no.3 to 6 and 8 to 10 in favour of plaintiff no.1 Ram Chander, reveals the position as under:

- A. ***Shiv Prasad Vs. Durga Prasad*** (1975) 1 SCC 405. The Supreme Court in this case was concerned with the question, whether an application under Order XXI Rule 89(1) of the CPC cannot be made unless prior application under Order XXI Rule 90 is effectively withdrawn and formal order passed. Order XXI Rule 89(1) empowers a person claiming an interest in the

property sold in execution of a decree to apply to the Executing Court to have the sale set aside. Order XXI Rule 90 empowers a decree holder or purchaser of immovable property sold in execution of a decree, to apply to the Executing Court for setting aside of the sale on the ground of a material irregularity in such sale. Order XXI Rule 89(2) provides that the person who has applied under Order XXI Rule 90 shall not be entitled to apply under Order XXI Rule 89(1) unless he withdraws the application under Order XXI Rule 90. It was held that merely by conveying to the Court that the application under Order XXI Rule 90 is being withdrawn the person becomes entitled to make the application under Order XXI Rule 89(1). It was reasoned that every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient and no order of the Court is necessary permitting him to withdraw the application; the formal order disposing of the application as withdrawn may be passed but the withdrawal is not dependent on the order of the Court. It was held that the act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application.

- B. ***Rajendra Prasad Gupta Vs. Prakash Chandra Mishra*** (2011) 2 SCC 705. The Supreme Court in this case was concerned with withdrawal of an application for withdrawal of a suit. The High Court had held that once the application for withdrawal of the suit was filed, the suit stood dismissed as withdrawn even without any order of dismissal of the suit as withdrawn and thus

the subsequent application for withdrawal of the earlier application for withdrawal of the suit, was not maintainable. Disagreeing therewith it was held that the subsequent application for withdrawal of the earlier application for withdrawal of the suit and on which earlier application no order of dismissal of the suit as withdrawn had been passed till then, was maintainable. Resultantly the suit which stood dismissed as withdrawn was restored.

- C. **Anurag Mittal Vs. Shaily Mishra Mittal** (2018) 9 SCC 691. Supreme Court in this case was concerned with the question whether the dismissal of the appeal relates back to the date of filing of the application for withdrawal. The appeal therein had been filed by the husband against the decree in favour of the wife, of dissolution of marriage. The husband appellant filed an application for withdrawal of the appeal. The husband, even before the order dismissing his appeal as withdrawn, remarried. The question for consideration was, whether the second marriage of the husband was during the pendency of the first marriage and thus void. It was held relying on **Shiv Prasad** supra (i) that Order XXIII Rule 1(1) of the CPC enables the plaintiff to abandon his suit or abandon a part of his claim against all or any of the defendants, as a matter of right, without the permission of the Court and the defendant cannot insist that the plaintiff must be compelled to proceed with the suit; once the plaintiff does so, he is precluded from suing again on the same cause of action; (ii) there is no doubt that Order XXIII

Rule 1 of the CPC is applicable to appeals as well and the appellant has the right to withdraw his appeal unconditionally and if he makes such an application to the Court, the Court has to grant it; (iii) therefore the appeal is deemed to have been withdrawn on the date of filing of the application for withdrawal; (iv) only when the plaintiff/appellant, after withdrawal of the suit/appeal, wants to sue afresh on the same cause of action, is he required to take an order granting such liberty, from the Court. Resultantly the second marriage of the husband solemnized after the filing of the application for withdrawal of the appeal but before the order of withdrawal of the appeal was held to be not void on the ground of having been solemnized during the subsistence of his earlier marriage.

24. A perusal of the aforesaid judgments would suggest a dichotomy of a view in the Supreme Court, with **Shiv Prasad** and **Anurag Mittal** holding withdrawal to be complete on mere filing of the application and even without any order disposing of the matter as withdrawn and **Rajendra Prasad Gupta** on the contrary to be holding that on mere filing of the application for withdrawal, withdrawal is not complete and an application for withdrawal, before order thereon can be withdrawn, with the *lis* to continue.

25. I have thus proceeded to look at the judgments of the High Courts and find, (i) the Division Bench of the High Court of Bombay in **Yeshwant Govardhan Vs. Totaram Avasu** AIR 1958 Bom 28 to have also held that it remains open to a plaintiff to withdraw his application for withdrawal of his suit, so long as the withdrawal has not become effective by an order of the

Court; (ii) a Division Bench of the High Court of Allahabad, after discussing in detail, in ***Raisa Sultana Begam Vs. Abdul Qadir*** AIR 1966 All 318 to have answered the reference “can the plaintiff who has already moved an application under Order XXIII Rule 1(1) withdraw the application for withdrawal of the suit before orders are passed on the withdrawal application”, in the negative; (iii) this Court in ***Curewell (India) Ltd. Vs. Sahib Singh*** 21 (1982) DLT 397 to have held that the second appeal stood withdrawn as soon as the application withdrawing the appeal was filed and the act of withdrawal was complete as soon as the appellant intimated the Court that he was withdrawing the appeal and withdrawal was not dependent on the order of the Court; thus the appellant could not have withdrawn the application for withdrawal; (iv) the High Court of Kerala in ***Mariyana Vs. Kochouseph*** 1990 SSC OnLine Ker 289 to have held that an application for withdrawal of a suit can be withdrawn before the Court passes an order on that application; (v) this Court in ***Bharat Bhushan Gupta Vs. Raj Kumar Gupta*** AIR 1994 DEL 207 to have held that it is not in every case that the withdrawal can be allowed to be revoked; finding the endorsement of withdrawal in that case to be not unqualified, the endorsement of withdrawal was permitted to be revoked; (vi) this Court again in ***Jaideep Gupta Vs. Inder Chand Jain*** 55 (1994) DLT 593 to have been again concerned with the issue of withdrawal of a withdrawal application; it was held so long as the Court is seized of the proceeding and the proceedings have not actually terminated, the Court retains jurisdiction to pass appropriate orders; accordingly the application for withdrawal of the suit was permitted to be withdrawn; (vii) the High Court of Bombay in ***Ujjwala Pawar Vs. Harish V Milani*** 2016 SCC OnLine Bom 15861 to have permitted withdrawal of an

application for withdrawal; (viii) the High Court of Calcutta in ***Sampat Singh Vs. Sharma Properties*** 2016 SCC OnLine Cal 2457 to have held that a right to withdraw a suit is not an unfettered right; a suit does not cease to exist merely because an application for withdrawal of the suit has been filed; the suit continues to exist till an order is made on the said application; it is always open to the Court to consider and decide any objections that may be made to the withdrawal of the suit, before passing any order on the application to withdraw the suit; when a valuable right has accrued in favour of the defendant, the Court may decline the plaintiff to withdraw the suit; merely by filing an application for withdrawal, the Court cannot act mechanically if an objection is raised that the plaintiff should not be permitted to withdraw the suit; (ix) the Division Bench of this Court in ***Vimal Jain Vs. Government of NCT of Delhi*** 254 (2018) DLT 668 to have, relying on ***Shiv Prasad*** supra held that since that attention of the Court was not drawn to the applications seeking withdrawal, the order of the Court on the Review Petition was unsustainable.

26. What emerges from the judgments aforesaid of the Supreme Court and the High Courts is that the question, whether withdrawal of a *lis* is complete on mere filing of an application for withdrawal or has to await the order on the application for withdrawal, has been decided by the Courts depending on the facts and the legal provisions involved. However what is clear and on which there are no two views, that once, before the order terminating the proceedings as withdrawn, any objection is raised qua the withdrawal, the Court has never shied away from deciding the said objection. I am in this regard in respectful concurrence with the dicta of the High Court of Calcutta in ***Sampat Singh*** supra,

27. Applying the aforesaid law, in the present case, the First Appellate Court did not allow the application for withdrawal of the First Appeal by plaintiff no.1 Ram Chander but transposed the plaintiff no.1 Ram Chander as respondent in the First Appeal. The reliance by the senior counsel for the respondents no.4(i) and 4(ii)/plaintiffs on **J.K. Bhatia** supra, in turn referring to Order XXIII Rule 1(5) CPC is apposite. The suit from which the First Appeal arose as well as this Second Appeal arises, was filed not by plaintiff no.1 Ram Chander alone but by four plaintiffs including plaintiff no.1 Ram Chander. Order XXIII Rule 1(5) provides that nothing in Order XXIII Rule 1 shall be deemed to authorize the Court to permit one of the several plaintiffs to abandon a suit or part of a claim under Order XXIII Rule 1(1) or to withdraw under Order XXIII Rule 1(3), the suit or part of the claim, without the consent of the other plaintiff. The First Appellate Court, though without referring to the said provision but perhaps owing thereto, did not allow the application of plaintiff no.1 Ram Chander for withdrawal of the First Appeal. Once there was such a bar of law, the argument of the counsel for the appellants/defendants that the First Appellate Court was incompetent to pass a decree for ejectment with respect to plots no.3 to 6 and 8 to 10, in favour of plaintiff no.1 Ram Chander, falls to the ground. Even otherwise allowing so would have resulted in inconsistent judgment and decree arising against different defendants from the same facts and evidence, with the suit for ejectment, insofar as against the lessees of plots no.3 to 6 and 8 to 10 being dismissed and against the lessee of plot no.2 being allowed, and which is impermissible in law.

28. I have hereinabove also observed that on mere execution of agreement to sell even if any, by plaintiff no.1 Ram Chander in favour of

occupants/lessees of plots no.3 to 6 and 8 to 10 the relationship of lessor and lessee did not come to an end. Reference if any required in this context may be made to *Jiwan Dass Rawal Vs. Narain Dass* AIR 1981 Del 291, *Sunil Kapoor Vs. Himmat Singh* 2010 SCC OnLine Del 354, *Satish Kapoor Vs. Km Ishwari Assudani* 2012 SCC OnLine Del 1808 (DB), *Cement Corporation of India Limited Vs. Life Insurance Corporation of India Limited* 2014 SCC OnLine Del 4536 (DB), *Chander Dutt Sharma Vs. Prem Chand* 2018 SCC OnLine Del 9903 and *Ravinder Singh Vs. Suresh Chand Punj* 2019 SCC OnLine Del 8112. Thus mere agreement to sell in favour of appellants/defendants occupants of plots no.3 to 6 and 8 to 10, does not defeat the proceedings for ejectment against them. The remedy of the lessees/occupants of plots no.3 to 6 and 8 to 10 is to have the agreement to sell if any in their favour specifically enforced.

29. In this context it may also be noticed that Ratni Devi is also claiming to be an agreement purchaser from plaintiff no.1 Ram Chander, of plots no. 3 to 6 and 8 to 10. The *inter se* rights of appellants/defendants in occupation of plots no.3 to 6 and 8 to 10 and of Ratni Devi are not the subject matter of this proceeding.

30. Resultantly, neither this Second Appeal raises any substantial question of law nor is there any merit therein. The appeal is therefore dismissed.

Decree sheet be prepared.

RAJIV SAHAI ENDLAW, J.

MAY 5, 2020
'gsr'/pp