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* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Date of decision: 06th August, 2024

+ CM(M) 2256/2024
JYOTI SWAROOP BAWEJA

.....Petitioner

Through: Mr. S. Mukerjee and Mr. Yogendra
Kumar, Advocates.

versus

DHARM VIR NAGPAL AND ORS

.....Respondent

Through: None.

CORAM:

HON'BLE MR. JUSTICE MANOJ JAIN

J U D G M E N T (oral)

CM APPL. 19446/2024(Exemption)

Exemption allowed, subject to all just exceptions.

CM(M) 2256/2024

1. Petitioner had filed a Civil Suit way back in the year 2015 seeking possession, injunction, declaration, damages and mesne profit.
2. When the above suit was pending adjudication, the plaintiff himself moved an application seeking unconditional withdrawal of his such suit. In application dated 23rd March, 2022, he mentioned as under:-

"2. That the plaintiff is seeking withdrawal of the present suit for the reason that the mother of the plaintiff on her death bed desired as her last wish from the plaintiff to withdraw the present suit as during last about one year the plaintiff got injured badly in two road accidents, suffered with Covid on two occasions as well as lost his bag having cash and documents. That due to Covid Pandemic, Accidents/Injuries, Infection from Covid 19 and continuous absence from the business the plaintiff suffered huge monetary loss and had under gone very bad and trying times during the said period.

3. That the mother of the plaintiff had died on 18/01/2022 and in



order to fulfill the last wish of the deceased mother the plaintiff no more wishes to pursue the present suit and thus is moving this application for withdrawal of the suit unconditionally.”

3. Based on the abovesaid application, the learned Trial Court permitted him to withdraw the suit on 24th March, 2022 and the suit was, resultantly, dismissed as withdrawn.
4. Thereafter, the plaintiff moved an application for revival/restoration of the suit. Such application was accompanied with an affidavit sworn on 5th June, 2023 and in the abovesaid application, the plaintiff claimed that he was misled by his own sister and because of such misrepresentation, he was made to believe that his mother wanted the plaintiff not to proceed any further with the suit and, therefore, it was prayed that he may be permitted to go for its revival.
5. Such request has been turned down by the learned Trial Court vide order dated 23rd December, 2023. The learned Trial Court observed that the application for revival had been filed after more than one year and there was no plausible or justifiable reason either, explaining the delay.
6. Be that as it may, the learned Trial Court has dismissed the above application which has compelled the plaintiff to move the present petition under Article 227 of the Constitution of India.
7. It is prayed that since the suit had been withdrawn on the basis of misrepresentation made by his own sister and since no equity has flown in favour of the opposite side either, the plaintiff may be permitted to revive the suit. Strong reliance has been placed upon *Jet Ply Wood Pvt. Ltd. & Anrs. Vs. Madhukar Nowlakha & Ors.:(2006) 3 SCC 699*.
8. It will be appropriate to note the relevant provision i.e. Order XXIII Rule 1 which reads as under:-



“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 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 plaintiff.”

9. Undoubtedly, when the suit was withdrawn, it was withdrawn unconditionally in view of the express wish conveyed to the plaintiff by his mother.



10. Admittedly, his such mother died on 18th January, 2022 and respecting her last wish, the suit was withdrawn.

11. In view of the abovesaid provision, the plaintiff can be permitted to withdraw or abandon his claim and it is upto the learned Trial Court, while granting such permission, to give any liberty to either institute fresh suit for the subject matter of the suit or part of the claim.

12. As already noticed above, in the case in hand, the plaintiff had sought unconditional leave to withdraw the suit. He was very specific in claiming in his application that his mother, while on death-bed, had desired that the plaintiff should not continue with the suit in question.

13. It is now contended by learned counsel for petitioner/plaintiff that in fact, it was his sister who had misrepresented the fact which let him move the aforesaid application. It is contended that had he known about the exact position, he would not have prayed for unconditional withdrawal of the suit.

14. However, this Court does not find any merit in such contention made by learned counsel for petitioner.

15. The suit was withdrawn and the claim was abandoned while respecting the wish of his mother who had already died. Merely by baldly claiming that it was the sister of the plaintiff who made misrepresentation in this regard, would not mean that the learned Trial Court would permit him to revive the suit as such.

16. There is no doubt that even in the absence of any specific provision, the application for revival can still be maintained and to that extent the petitioner is justified in placing reliance upon *Jet Ply Wood Pvt. Ltd.* (supra). However, in that case, the petitioner had withdrawn the suit on the ground that there were talks of settlement between the parties and, therefore, he no longer



wished to proceed with the suit and he also did not seek any relief to file a fresh suit on the same cause of action. Later on, when he learnt that the other side had sold the premises in question, he prayed for revival of the suit claiming that he had been misled into making such application on account of the misrepresentation by one Shri Biswarup Banerjee and other co-owners that they would sell the property to him, provided he withdraw the same. It was in the abovesaid peculiar factual matrix that the abovesaid suit was eventually permitted to be revived.

17. In the case in hand, the situation is totally different and the position herein cannot be equated with the one in the above said case of *Jet Ply Wood Pvt. Ltd.* (supra).

18. It is difficult to imagine that the plaintiff would have withdrawn the suit on mere asking of his sister. After all, he himself was the plaintiff and must have taken said step as per the last wish of his own mother. There is nothing to indicate that during said last days, he was not with her. Moreover, in the peculiar factual matrix, it would be appropriate if the departed soul continues to rest in peace.

19. Even if the aspect related to delay is sidelined for the time-being, since the withdrawal was totally unconditional and was consequent upon the last wish coming from his own mother, it cannot be said that there was any chance of the plaintiff being misled.

20. Viewed thus, I do not find any merit in the present petition and the same is hereby dismissed.

(MANOJ JAIN)
JUDGE

AUGUST 6, 2024/ss