



2025:DHC:104



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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**Date of decision: 07th JANUARY, 2025IN THE MATTER OF:+ **CS(COMM) 947/2016****CUBE CONSTRUCTION ENGINEERING LTD**

.....Plaintiff

Through: Mr. Jayant Mehta, Senior Advocate
with Ms. Madhu Sweta, Ms. Astha
Dhawan and Ms. Tina Aneja,
Advocates.

versus

NATIONAL BUILDING CONSTRUCTION COMPANY

.....Defendant

Through: Mr. Anil K. Airi, Senior Advocate
with Mr. Krishan Kumar, Mr.
Seemant K. Garg, Mr. Nitin Pal, Ms.
Sadhana Sharma, Mr. Mudit Ruhella,
Mr. Shayuk Kumar, Advocates

CORAM:**HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD****JUDGMENT (ORAL)**

1. The present suit is one for recovery of a sum of Rs.8,21,64,607/- along with *pendente lite* interest of 18% per annum.
2. The facts as stated in the plaint are that the Plaintiff is a company registered under Companies Act, 1956 and is engaged in the business of construction of buildings, roads, bridges, water supply, sewerage and all other civil and engineering construction works. It is stated in the plaint that a Notice Inviting Tender (NIT) was brought out by the Defendant on 16.09.2004 for execution of "Housing Project for Defence Personnel" at



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Darjipura, Vadodra, Gujarat. The said NIT was for two packages i.e., Package-I and Package-II. It is stated that the Plaintiff had submitted its bid for Package-II which was opened on 04.10.2004. *Vide* a Letter of Intent (LOI) dated 15.10.2004, the Plaintiff was awarded part of Package-II for construction of dwelling units with ROC framed structure work, including internal electrification, PHE, storm water drainage and rain water harvesting etc. The bid of the Plaintiff was accepted for an amount of Rs.11,16,78,263/-. The period for completion of the project was reckoned as 22 months and the date of commencement was 10 days from the date of issuance of LOI and the completion date was 25.08.2006. A formal Contract Agreement was entered into between the parties on 20.12.2004. The said Contract Agreement provides that the Agreement is deemed to be executed at New Delhi and the Courts in Delhi/New Delhi alone will have jurisdiction to deal with matters arising therefrom. It is stated that the Plaintiff mobilized its resources as required in terms of manpower, machinery and material and requisite Bank Guarantee was also submitted by the Plaintiff. It is the case of the Plaintiff that despite issuance of LOI, the Plaintiff was not able to carry out the work as planned because of defaults on the part of the Defendant in issuance of instructions and drawings and also delay on the part of the Defendant in providing the site layout. It is stated that the layout was given by the Defendant on 19.10.2004 and the structural drawings were given on 28.10.2004. It is stated that since the work was to be carried out in a restricted area, there were several other limitations in carrying out the work at the site. The plaint discloses that there were certain disputes regarding price escalation index which was used by the Defendant. It is stated that there was under estimation of the tender value by the Defendant



as proper guidelines were not followed. It is stated that there were also several other lapses on the part of the Defendant in giving various approvals and clearances. Paragraph No.11 of the plaint provides the detailed reasons for the delay caused in completion of work and the same is being reproduced as under:

“11. During the execution of work at site, there were various lapses by the Defendant in giving approvals and clearances. Due to pending clearances, the execution of work was badly affected causing delay in completion of the project. A perusal of various correspondences proves the lapses/failure on the part of Defendant to expedite the various confirmation/approvals/clearances pending at its end which stalled the timely completion of the work. The major reasons for the delay are narrated below:-

a. While excavation for foundations was being done, obstruction due to water pipeline and drainage pipeline etc. was found for some of the blocks. This was intimated to the Defendant by Plaintiff vide letter dated 14.12.04. However, no immediate action was taken by the Defendant and hence, the excavation and subsequent work for such blocks could not proceed further.

b. That after completion of excavation for some blocks, the Plaintiff was ready to do the concreting work for foundation but was unable to proceed due to want of necessary clearance by Defendant. The clearance was pending due to want of test reports for test piles which should have been completed at the designing stage. Reliance is placed on letter dated 06.12.2004 vide which the Plaintiff also communicated to the Defendant the delay and loss caused due to this default. The Plaintiff sent reminders in this regard vide letters dated 13.12.2004. The aforesaid default by the Defendant



caused heavy losses to the Plaintiff due to deployment of manpower and resources which were idle/partially utilized and also led to a delay of almost two months.

c. It is stated that as per Clause No.68.0 of Special Terms and Conditions of Volume-2 of Tender documents, the structural steel to be used for the subject project was of TOR type and TOR steel was to be procured from approved vendors as listed in this clause (SAIL, TISCO, RINL, IISCO). The Defendant has calculated in the BOQ the rates for TOR steel (Deformed or twisted bars) only and used rates as per SSR 1996 for TOR steel only. The Defendant had been informed by DG MAP by its policy letter dated 10.09.2004 to use TMT Steel in MAP works and had also given a list of 14 other approved secondary producers of TMT steel. However, as intimated to the Defendant vide Plaintiff's letter dated 20.01.2005, TOR type steel bars of approved make were not available by approved manufacturers as per Defendant's tender clause. The Plaintiff reminded the Defendant about the issue of non-availability of required grade of steel and sought the Defendant's co-operation for resolving the said issue vide letters dated 27.01.2005 and 29.01.2005. The Plaintiff requested the Defendant vide letter dated 4.02.2005 to approve alternate producers/brands of TMT bars which were readily available in the market and were qualitywise at par with the bars of vendors approved by the Defendant. In response, the Defendant vide letter dated 14.02.2005 denied that there was any scarcity of TOR steel, and kept on delaying the approval urgently sought by the Plaintiff. The Defendant had asked for quotations from the approved steel producers for TOR steel required for this project and the producers have by quotation dated



15.02.2005 instead of TOR steel submitted quotation for TMT steel. The producer like RINL also informed the Defendant that they do not make deformed bars. The Defendant replied to RINL by its letter dated 16.02.2005 stating that "We are directing our contractors to contact your office for procurement of steel from RINL". In response, RINL sent its quote dated 17.02.2005 to the Plaintiff.

The Plaintiff further informed the Defendant that under the aforesaid circumstances and as per the letter issued by the Defendant, TMT steel was being used for the project, which was costlier than TOR steel and hence, requested for amendment letter so that the cost difference can be claimed by the Plaintiff. The steel forms a major part of items cost (more than 20%) in a Civil Construction and the change in its price has a direct major impact on total cost of the project. However, the Defendant did not pay the cost difference of using TMT steel to the Plaintiff on the ground that the Contract specifies TOR steel, despite being fully aware that TOR steel was not being manufactured by any of the approved vendors. The Defendant delayed the approval of other steel producers / brand. If Defendant had acted timely, some delay which occurred due to non-availability of steel of tender approved producers could have been reduced. The Defendant has floated a similar tender for a project in Ahmedabad in March 2005 and for that project the list of approved steel producers was as per DG MAP's list of September 2004. Reference is made to Plaintiffs letters dated 17.02.05, 11.03.2005, 16.06.05, 20.06.05, 14.07.05, 27.07.2005, 17.08.2005 28.11.05 and 06.12.05.

d. It is submitted that the tender specified for use of Grade 43 Cement and some specific brands to be



used. However, Grade 43 cement was not available with the approved brands or manufactures. This was communicated to the Defendant vide Plaintiffs letter dated 20.01.2005 and 27.01.2005. The Plaintiff sent various reminders in this regard and requested for suggestion of additional/alternate brands, grade etc. primarily so that the project work does not get delayed and project can be completed in time. However, the Defendant denied scarcity or non-availability of Grade 43 cement and also denied the Plaintiffs request for use of alternate brand. Reference is made to letters dated 28.01.2005, 29.01.2005, 14.02.2005, 16.06.2005 and 04.02.2006 in this regard. Even DG Map vide letter dated 29.07.2005 had conveyed to the Defendant that alternate makes of Grade 43 cement can be used. The Defendant deliberately at a much later date approved alternate brands / grades of Cement.

e. The drawings regarding rain water harvesting pertaining to the Plaintiffs scope of work were not issued by the Defendant till 2006. The Plaintiff requested the Issuance of the aforesaid drawings/details vide letters dated 10.04.2005, 28.11.2005, 18.04.2006, 25.04.2006, 10.05.2006, 19.05.2006, 14.06.2006, 03.08.2006 and 19.09.2006. Reference is also made to Defendant's reply dated 06.11.2006 in this regard. The delay in issuance of the drawings adversely affected the progress of work and led to heavy losses to the Plaintiff. The Plaintiff could take up this RWH work much after the original project completion date. The Defendant approved for providing of curtain road of Vista Levolor make and surface dressing work by its letter dated 20.03.2007 and the project could be completed after these works. These approvals were pending for a very long time and project was delayed due to delay in these approvals also.



f. It is submitted that the Defendant provided the first plan for storm water drainage only on 01.03.2006. The Plaintiff vide various correspondences and discussions reminded the Defendant about the requirement of different sketches showing different sections of storm water drains. However, the Defendant delayed in providing the necessary sketches and the first sketch was provided only on 06.07.2006. Thereafter, further details were given after almost 20 months since the start of project causing delay of the project execution. Reference in this regard is made to Plaintiff's letters dated 05.05.2006 and 30.05.2007.

g. The work of building approach road to site, required for movement of men and material and speedy execution of the work was given to some other contractor by the Defendant. However, this work was not taken up for a very long time and due to non-availability of approach road, the Plaintiff had to Incur heavy losses in terms of extra freight charges, extra labour charges, idle labour cost, wastage of time etc. resulting in delay in the work progress. This is evident from Plaintiff's letter dated 05.10.2005 wherein the loss incurred by Plaintiff was clearly communicated to the Defendant. The Plaintiff continued to send reminders regarding the constriction of approach road. However, the road was partially built only in 2007 when the Plaintiff had almost completed their work as per scope of contract. Reference in this regard is made to Plaintiff's letters dated 16.06.05, 19.09.2005, 28.11.05 and 28.08.2009.

h. After the start of the project, the Defendant had directed the Plaintiff vide letter dated 1.04.2005 and 27.12.2005 to use 25% Fly ash bricks instead of



normal bricks as per the BOQ which was a major deviation and the rates quoted in the BOQ were only for normal clay bricks. The Plaintiff requested the Defendant for approval of rate analysis for use of Fly ash bricks instead of conventional bricks which had also been conveyed to the Defendant by DG MAP by policy letter dated 02.07.2004. However, the said rates were not finalized/approved by the Defendant, thereby affecting the pace of the work. Reference in this regard is made to Plaintiff's letters dated 14.04.2005, 16.06.2005 and 03.01.2006 and MOM dated 6.09.2006.

i. Further, the Defendant delayed in taking decisions on several trivial issues like drinking water connection, use of electrical materials, fittings etc., which led to delay in execution of the project work. Reference in this regard is made to Plaintiffs letters dated 05.10.2005, 04.02.2006, 21.04.2006, 09.05.2006, 04.07.2006 and Defendant's letter dated 07.07.2006. The Plaintiff had by its letter of 7.06.2006 conveyed to the Defendant that 8 blocks would be ready by end of June 2006 for handing over and also conveyed that external drains, water and power facilities are not yet ready. Hence, the handing over should not be delayed on these account. The Plaintiff was ready to complete the project work gradually but the Defendant was not ready to take over the completed blocks.

j. That the Plaintiff required access to their godown at the site where they had stored the material required for attending to defect liability period work and handing over/taking over of the Dwelling Units. However, due to fencing around the godown by the station authority, the progress of defect liability period work got affected. The Plaintiff requested for removal of the fencing at the earliest as evident from



Plaintiffs letter dated 22.12.2009.

12. The Plaintiff sent several reminders apprising the Defendant about the delay in project due to various issues as detailed in the preceding paras T and also due to pending decision and approvals by the Defendant. Since, there was no action taken by the Defendant, the Plaintiff had to seek the first extension of time for 128 days vide letter dated 14.08.2006 detailing the various delays on the part of the Defendant. The said letter detailed the hindrances that necessitated the Plaintiff to seek extension of time as extracted hereunder:-

a. Delay due to sample pile testing before actual pile concreting/casting-21 days.

b. Delay due to obstruction in excavation of block nos. OR-25 and OR-26 by existing water and drainage line -20 days.

c. Delay in shortage of reinforcement steel.

d. Delay in non-availability of steel and cement.

e. Delay in approval of secondary steel manufacturer-311 days.

f. Delay due to change to concealed wiring with PVC conduits instead of surface wiring on teakwood battens-96 days.

g. Delay in approval of Fly-ash Bricks-81 days.

h. Delay due to non-availability of drawings and details of Rain Water Harvesting.

i. Delay due to non-availability of drawing for Storm Water Drainage.



J. Delay due to discrepancies in BOQ item No. M.R.-20 under electrical work head.

k. Delay due to non-approval of Electrical material.

1. Delay due to non-completion of internal roads/approach roads.

m. Delay due to shortage of OPC-43 Grade cement and approval of PPC cement.

13. The Defendant vide letter dated 21.08.2006 granted extension of time to all the contractors working in their project upto 28.09.2006. The Defendant vide letter dated 26.09.2006 granted further extension of time upto 15.01.2007, and vide letter dated 12.01.2007 granted extension of time upto 30.04.2007 to the Plaintiff. It is submitted that the reasons for granting various extensions of time were utter failure on behalf of the Defendant to setup a responsive decision making authority to resolve the issues causing impediments in the completion of the project, and frequent changes made in the requirements and delays in releasing the drawings and details, thereby delaying the approvals/clearances required expeditiously for timely completion of the project. Reference in this regard is made to Defendant's letters dated 21.08.2006 and 26.09.2006.

14. That as the work was not completed within stipulated completion period, the Plaintiff was compelled to work during the extended period. During the extended period, the Plaintiff incurred extra/higher rates/charges for materials, wages in addition to fixed costs and overheads, plant and machinery cost, cost of extra guarantee and security deposit etc. resulting in heavy loss which was never compensated by the Defendant nor did the Contract Agreement contain any provision for



reimbursement of the same.

15. Besides the various delays, there were major delays even with respect to payment of RA bills by the Defendant. The Plaintiff vide several letters reminded the Defendant about the pending payments of RA bills, which were not released in time to the prejudice of the Plaintiff. Reference in this regard is made to letters dated 24.02.2007, 25.04.2008, 06.07.2009 and 28.08.2009. It is pertinent to mention that the Plaintiff completed the project by 30.04.2007. The taking over of completed project was delayed by the Defendants other facilities which are necessary for use of Dwelling Units like Water Supply, Electric Supply, Drainage facility, Road etc., (which were not within the scope of work of the Plaintiff) were not made ready. The Plaintiff brought these issues to the knowledge of the Defendant vide various correspondences pointing out that in the absence of the essential services being completed and functional, the taking over of the project is likely to get delayed. Reference in this regard is made to Plaintiff's letters dated 07.06.2006, 19.04.2008, 25.04.2008, 05.07.2008, 05.07.2009, 23.03.2010 and 06.12.2011.

16. The Plaintiff also sent reminders to the Defendant regarding other Issues namely payment of dues, unpaid bills, payment of wrongful deductions as well as the deductions made against the Security Deposit. However, no response was received from the Defendant. It is pertinent to mention that the Defect Liability period was upto a period of 24 months. Despite of the said fact, the Defendant failed to release the final payment as well as the deductions made against the security deposit as stipulated in the Contract Agreement.

17. Notwithstanding the completion, the Defendant again delayed in taking over the work and further delayed in issuing the Completion Certificate. The



arbitrary conduct of the Defendant is evident from the fact that the completed units were not declared as taken over and Issuance of completion certificate was not done, which was required for processing the final bill. Hence, the Plaintiff was constrained to file a Civil Suit no.552 of 2008 before the District Court, Vadodara on 23.10.2008 seeking payment of pending bills and claims. The Defendant resorted to coercive measures and issued a show-cause notice dated 13.12.2008 directing the Plaintiff to explain why no action should be taken under Clause 71 of GCC. The Defendant also conveyed that the Security Deposit, Performance Guarantee and any other dues will be forfeited and sent letters to the Plaintiff's bankers for encashment of Performance Guarantees. Reliance is placed in this regard on Bank of Baroda's letter dated 5.01.2005 which was sent to the Defendant Because of aforesaid coercive and arbitrary conduct of the Defendant, the Plaintiff withdrew the Civil Suit filed before the District Court, Vadodara on 30.12.2008 as the encashment of the Performance Guarantees would have caused irreparable loss of reputation and loss of business and adverse impact on the Plaintiff's Banking facilities and further, that the completion certificate will not be issued. The Plaintiff time and again sent reminders to the Defendant seeking details about the issuance of the completion certificate. A reminder in this regard was again sent to the Defendant on 30.11.2011.

18. Since no response about completion certificate was received from the Defendant, the Plaintiff preferred various applications under the RTI Act, 2005 enquiring the status of present project. Reference is made to correspondences dated 7.01.2008, 18.02.2008, 17.04.2009, 12.05.2009, 28.10.2009, 08.07.2011 and 16.09.2011 in this regard. The Defendant in one of its replies informed that the Completion certificate Is not being issued by the station authority as the complaints of



the user is not being attended to fin satisfaction level. Reference is made to Defendant's letters dated 11.02.2008, 28.03.2008, 16.05.2009, 19.10.2011 and 20.11.2009 and DG Map's letters dated 22.06.2009 and T 25.07.2011 this regard. The Plaintiff further made representation on various issues to the Defendant. Reference is made to Defendant's letter dated 14.12.2012 and Plaintiff's response dated 9.01.2013.

19. After a gap of five years on 04.02.2012, the Defendant issued completion certificate of Package II-B dated 18.01.2012 at Darjipura for Dwelling Units conveying this was completed on 30.04.2007 and taken over by MES GE(1) AF Baroda. Reliance is placed on letters dated 25.04.2008, 05.07.2008 and 31.10.2012 in this regard.”
(emphasis supplied)

3. Written statement and replication have been filed and evidence has been led. Issues have been framed on 23.08.2016.
4. The issue which is now to be considered is whether the present suit is hit by Order XXIII Rule 1(4) of CPC or not.
5. During the course of arguments, learned Senior Counsel appearing for the Defendant raises a preliminary objection by stating that the present suit is hit by Order XXIII Rule 1(4) of CPC. He draws attention of this Court to the plaint being Civil Suit No.552/2008 filed by the Plaintiff before the District Court, Vadodara.
6. Learned Senior Counsel for the Defendant draws attention of this Court to the application for withdrawal of the suit filed by the Plaintiff before the District Court, Vadodara. The said application reads as under:

“Special Civil Suit No.552/2008



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**IN THE COURT OF SR. CIVIL JUDGE AT
VADODARA**

Plaintiff

***M/s Cube Construction
Engineering Limited***

Defendant

***National Building Cons-
truction Corporation***

MAY IT PLEASE YOUR HONOUR

I, the undersigned Director & Authorized Signatory of Plaintiff Company, do hereby submit that due to change of cause of action Plaintiff Company seek to leave to withdraw the present suit unconditionally for which necessary leave be granted and legitimate court fees be directed to be refunded in favour of the Plaintiff Company in the larger interest of justice.

Place :Vadodara

Date : 30.12.2008

*Shri Nilesh Arvindbhai Gandhi
Director & Authorized
Signatory of M/s Cube
Construction Engineering
Limited”*

7. Learned Counsel for the Defendant submits that suit filed in Vadodara was withdrawn unconditionally in the aforesaid application filed by the Plaintiff on 30.12.2008. The endorsement which is hand-written indicates that the Plaintiff was not interested in proceeding with the matter and has proceeded to withdraw the suit. The suit was disposed of accordingly and the Court Fee was directed to be returned.

8. Learned Counsel for the Defendant, therefore, submits that since the Plaintiff has withdrawn the suit unconditionally before the District Court, Vadodara, the present suit filed by the Plaintiff is not maintainable.



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9. Learned Senior Counsel for the Plaintiff submits that withdrawal of the suit before the District Court of Vadodara does not take away the right of the Plaintiff to file a fresh suit for the reason that the Contract Agreement dated 20.12.2004 specifically states that only the Courts at New Delhi had the exclusive jurisdiction to entertain the dispute arising out of the Agreement. He states that the parties have impliedly excluded the jurisdiction of Courts at Vadodara. He states that the Plaintiff could not have filed the suit before the Court at Vadodara as it did not have jurisdiction to entertain the dispute and, therefore, the Order of withdrawal was a nullity as it was passed by a Court without having any jurisdiction and Order XXIII cannot apply when a Suit is withdrawn from a Court not having jurisdiction. Learned Counsel for the Plaintiff places reliance upon a Judgment passed by the Apex Court in Kiran Singh and Others vs. Chaman Paswan and Others, (1954) 1 SCC 710 in support of his contention. He states that a decree passed by a Court without having jurisdiction is a nullity and a defect in jurisdiction whether it is pecuniary or territorial strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties. He also places reliance upon a Judgment passed by a Division Bench of this Court in DLF Industries Ltd vs. ABN Amro Bank & Ors, 2000 (55) DRJ (DB) in support of his contention.

10. Learned Senior Counsel for the Plaintiff further places reliance upon a Judgment passed by a Single Judge of Gauhati High Court in Violet Mawrire vs. Ka Jelina Jyrwa, 2010 SCC OnLine Gau 729 wherein the learned Single Judge, on a similar fact, has held that if a suit is filed before a Court lacking inherent jurisdiction and the same is withdrawn even if unconditionally then this does not prevent a fresh suit being filed even on



the same subject matter before the Court having competent jurisdiction.

11. Learned Senior Counsel for the Plaintiff further submits that the abandonment of claim under Order XXIII Rule 1(4) of CPC is a mixed question of law and fact and the language of the Order of withdrawal is not always determinative without considering the background facts. He states that the Plaintiff has been coerced to withdraw the suit and this fact has been specifically mentioned in the present plaint and therefore, without understanding the facts in the correct perspective, the provisions of Order XXIII Rule 1(4) CPC cannot be applied without going into the question of fact. He places reliance upon a Judgment passed by the Apex Court in Himachal Pradesh Financial Corporation vs. Anil Garg and Others, (2017) **14 SCC 634** in support of his contention.

12. Learned Counsel for the Plaintiff submits that numerous correspondences have been exchanged between the Plaintiff and the Defendant after withdrawal of the suit which establishes that cause of action still continues.

13. Learned Senior Counsel for the Defendant places reliance upon a Judgment passed by the Apex Court in Sneh Lata Goel vs. Pushplata, (2019) **3 SCC 594** to contend that it was not as if the Court at Vadodara did not have jurisdiction to entertain the dispute. He states that a lack of territorial jurisdiction cannot be confused with the inherent lack of jurisdiction of a Civil Court to entertain a suit. He states that when the Defendant raised the objection of territorial jurisdiction, the Court had an option to return the plaint back under Order VII Rule 10 of CPC or the Plaintiff could seek for return of plaint for filing the same before a competent Court of jurisdiction. He states that the Plaintiff has unequivocally withdrawn the suit showing its



intention to abandon the entire claim.

14. Heard learned Counsel appearing for the Parties and perused the material on record.

15. This Court has perused the plaint filed by the Plaintiff before the District Court, Vadodara. Relevant portions of the said Plaint are extracted below and the same reads as under:

"4) The Plaintiff Company submits that, thereafter the Plaintiff Company had started the work, and since starting of the work due to various hindrances and problems on the part of the Defendant Company, the work could not get momentum. The Plaintiff Company submits that, the necessary clearance for pouring concrete was not given by the Defendant Company due to pending test of piles and the Plaintiff Company was unable to go ahead with the pouring of concrete in piles and had requested the Defendant Company for the same on 06/12/2004. The Plaintiff Company submits that, thereafter the Plaintiff Company had supplied the Compaq make computer set (P4) along with HP make printer to the Defendant Company at site office on 07/12/2004. The Plaintiff Company had already built and provided a furnished site office for the use of Defendant Company's engineers and stall ic carry out quality checks and inspection on day to day basis during execution. The Plaintiff Company further submits that the additionally representatives of third party consultant (M/S. Dorsch Consultants) and representative of DG (MAP) were also doing quality checks and inspection during execution of project. The Plaintiff Company submits that, thereafter the Plaintiff Company vide their various letters requested the Defendant Company regarding problem of short supply of steel bar of various sizes, and the TOR steel as per BOQ was not being produced any more for the makes specified and Plaintiff Company had to use



costly alternative TMT steel as per the instructions of the Defendant Company, which has caused huge additional cost to the Plaintiff Company and also delays in project. The Plaintiff Company submits that, there was shortage of cement and steel supplies as informed to Defendant Company vide letter dated 29/01/2005 and the Defendant Company to allow the Plaintiff Company to use of other brands subsequently. The Plaintiff Company submits that, various working drawings were given by the Defendant Company in February/March, 2005 for civil works, internal PHE work and Electrical work, which has caused delay in the planning and execution of the work of the Plaintiff Company, and the other drawings for storm water drainage and rain water harvesting were given later on in year 2006. The Plaintiff Company submits that, thereafter the Plaintiff Company had clarified queries about their performance Bank Guarantee valid till 02/11/2006, which was Informed to the Defendant Company vide their letter dated 21/01/2005. The Plaintiff Company submits that, the Plaintiff Company from time to time conveyed about the difficulty in availability of cement and steel of required specifications and requested for permission to use alternative brands and the timely confirmation pertaining to the same was not given to the Plaintiff Company. The Plaintiff Company submits that during the progress of the work, the Plaintiff Company was facing problems at security gate regarding entry of personnel, materials, locis and machinery etc., which had caused unnecessary problems during the execution of the operation of construction work, and requested the Defendant Company vide letter dated 25/02/2005 to look after the same.

5) The Plaintiff Company submits that, the Defendant Company vide their letter dated 01/04/2005 instructed the Plaintiff Company to use Fly Ash Bricks in the



brick works instead of sub class 'B' bricks as per Govt. of India Gazette Notification No 979 (E) dtd.27/08/2003 and requested the Plaintiff Company to submit the rate analysis, which as per the BOQ item No. 17, 18 & non- scheduled item No. 12 of the contract agreement. The Plaintiff Company submits that they had to slow down the brick masonry work till the details are finalized, causing further delay in execution of project. The Plaintiff Company submits that, further the Defendant Company after site visit by DG (MAP) in 2nd week of February, 2005 requested the Plaintiff Company on 01/04/2005 to furnish the difference in cost for providing of concealed wiring in place of wiring on teak wood battens along with the rate analysis. The Plaintiff Company submits that, the approval of fly ash bricks and the rates took many months and the rate worked out by the Plaintiff Company had not been approved without giving any reasons. The Plaintiff Company submits that, the internal road was to be made available by the Defendant Company for movement of material and staff, but the Defendant Company did not make available the road in time before onset of monsoon and thereby, the Plaintiff Company faced difficulty in moving men and materials during the monsoon period from 2005 to 2006. The Plaintiff Company submits that the Defendant Company did not provide details of Storm Water Drain (SWD) and Rain Water Harvesting (RWH) in time and due to heavy rainfall in Jun-July, 2005 water logging occurred at site, work could not be done, and as the area where the work was to be done being of black cotton soil, more time for water to dry up, which has caused further delay in execution of project work. The Plaintiff Company submits that, the Plaintiff Company had vide their letter dated 05/10/2005 informed the Defendant Company that due to the non construction of approach road to site and rain water harvesting, they were put to further



additional costs and expenses. The Plaintiff Company submits that the Plaintiff Company vide their letter dated 28/11/2005 conveyed to Defendant Company that there are possibilities of cracks at some places as necessary precautions and provisions are not in design provided by Defendant Company. The Plaintiff Company submits that, there was acute shortage of OPC-43 grade cement in Feb-Mar, 2006 and approval of Defendant Company to use alternate PPC cement took over one month, which had caused delay in progress of the work. The Plaintiff Company submits that, the Plaintiff Company had vide their letter dated 25/04/2006 informed the Defendant Company various difficulties including safety reasons to complete the Rain Water Harvesting as per design given by the Defendant Company, and suggested an alternate system of Rain Water Harvesting to the Defendant Company, and which was replied by the Defendant Company vide letter dated 02/05/2006, and the Defendant Company requested the Plaintiff Company to obtain the approval of alternate method of Rain Water Harvesting from CGWB and to submit the same along with complete scheme to the Defendant Company. The Plaintiff Company submits that, thereafter the Plaintiff Company vide their letter dated 09/05/2006 informed and requested the Defendant Company to clear the discrepancy in BOQ item No. MR-20 under Electrical Work Head, which was cleared by the Defendant Company after two months and asked the Plaintiff Company to use the alternate item of a higher cost, which caused the Plaintiff Company extra expenditure. The Plaintiff Company submits that, thereafter there was curfew in Vadodara city in the month of May, 2006 and the Plaintiff Company could not move their materials or manpower for 10-12 days, which further delayed the execution of work.



6) The Plaintiff Company submits that, the Plaintiff Company vide their letter dated 07/06/2006 informed the Defendant Company that by end of June, 2006 eight numbers Blocks would be ready for handing over, however, the connections for external drain, water and power lines were not made available by the Defendant Company, and requested the Defendant Company to make early arrangement for the same. The Plaintiff Company vide letter dated 01/07/2006 conveyed to Defendant Company that, the financial Implication of the new clause 23.3 for deducting workers Cess from the Plaintiff Company's bill in two equal installments is not justifiable, as the same was not as per the terms and conditions of the Plaintiff Company's contract, and therefore, the Plaintiff Company had requested the Defendant Company not to deduct 1% amount towards construction work Cess and refund the amount deducted from the bills. The Plaintiff Company submits that, there was delay in supply of Storm Water Drainage drawing, and therefore, the Plaintiff Company was not able to utilize the manpower, and the sketch was given by the Defendant Company later on vide their letter dated 06/07/2006, and the Defendant Company had later specified their rates for the same vide letter dated 21/12/2006, and the BOQ did not provide for excess soil removal for Strom Water Drain work, and the same was done by the Plaintiff Company, and which has caused delay in execution of the work. The Plaintiff Company submits that, the Plaintiff Company vide their letter dated 14/08/2006 requested the Defendant Company for extension of time for 128 days i.e. up to 31/12/2006 due to various hindrances and delays caused and attributed by the Defendant Company as explained above. The Plaintiff Company submits that the Defendant Company vide their letter dated 21/08/2006, provisionally granted extension of lime up to 28/09/2006 and the extension of time was further



provisionally granted from 29/09/2006 to 15/01/2007 by the Defendant Company vide their letter dated 25/09/2006. The Plaintiff Company submits that, they had requested the Defendant Company to stop making deductions from the R.A. Bills on accounts of recovery for 4 Nos. of labors deployed by the Defendant Company, as the most of contract work was over and the contractual period was over, which the Defendant Company had refused vide their letter dated 13/11/2006, and the Plaintiff Company also submitted the extended performance bank guarantee for the period up to 02/02/2008 to the Defendant Company.

7) The Plaintiff Company submits that, the Plaintiff Company have submitted the Performance Bank Guarantee for extended period valid upto 02/02/2008 vide letter dated 02/11/2006, thereafter, vide Their letter dated 08/11/2006, the Plaintiff Company has informed the Defendant Company that due to delay in decisions, the Plaintiff Company was put to a loss in terms of price increase and prolonged overheads, and requested the Defendant Company to allow the price 'escalation for the period being wasted by the Defendant Company in finalizing the decisions. The Plaintiff Company submits that, vide their letter dated 13/11/2006, they have informed the Defendant Company that the work in all respect has been completed in Block No.9 to 16 i.e. total 8 nos. of block and requested to take over the possession of the same. The Plaintiff Company Submits that, the Defendant Company vide their letter dated 17/11/2006 informed the Plaintiff Company that the R.A. Bill for the work done up to 28/09/2006 has not been submitted, and further informed the Plaintiff Company that, the payment of the bill will be released to the Plaintiff Company after release of payment to the Defendant Company from the principal employer i.e. DG MAP. The Plaintiff Company submits that, the Plaintiff



Company vide their letter dated 30/11/2006 informed the DG (MAP) that due to arbitrary and autocratic approach adopted by the Defendant Company during the period of entire project execution and due to haphazard deductions made from the payment of the Plaintiff Company, the Plaintiff Company was incurring huge loss, and thereafter, the Plaintiff Company vide their letter dated 20/12/2006 informed the Defendant Company that the work has been completed and minor defect/repairs Which needs to be rectified are going on and will be completed within short time. The Plaintiff Company submits that, the Plaintiff Company vide letter dated 07/01/2007 submit the statement showing the cost implication for change in specification in cast-iron pipes using centrifugally casted spun soll pipe (IS-3989) instead of Sand cast CI. Pipes (IS-1729) as per DG (MAP) policy letter. The Plaintiff Company submits that, the extension of time was further provisionally granted up to 30/04/2007 by the Defendant Company vide their letter dtd. 12/01/2007.

8) The Plaintiff Company Submits that, the execution of project was finally completed in all respect including Civil, Internal PHE and Electric Work, Storm Water Drain, Rain Water Harvesting and all DU's were ready and Informed to the Defendant Company vide letter dated 15/01/2007. The Plaintiff Company submits that, thereafter, the Plaintiff Company vide their letter dated 17/01/2007 informed the Defendant Company various issues which were not resolved by the Defendant Company, and as a result the Plaintiff Company was put to a huge financial loss and was unable to raise invoices for the difference/balance amount for the work done for change in specifications by the Defendant Company, and thereafter, the Plaintiff Company vide their letter dated 27/03/2007 submitted the deviation statement quantities and amount thereof, and requested



the Defendant Company to take the immediate action to proceed, so as to release the withheld amount on account of executed quantity exceed as per BOQ. The Plaintiff Company submits that, the Plaintiff Company has given the final bill dtd.30/04/2007 to the Defendant Company. The Plaintiff Company submits that the Defendant Company continued to deduct the amount of labour Cess from the Plaintiff Company's bills, and therefore, the Plaintiff Company has written a Letter dated 12/05/2007 to the Defendant Company and requested to refund the labour Cess deducted from the Plaintiff Company's bill, and the said request has been raised by the Plaintiff Company to the Defendant Company from time to time, even though the Defendant Company continued to deduct amount towards labour Cess from the Plaintiff Company's bill. The Plaintiff Company submits that by a letter dated 30/06/2007 requested the Defendant Company to issue completion certificate. The Plaintiff Company submits that, thereafter, the Plaintiff Company vide their letter dated 01/01/2008 again informed and requested the Defendant Company to issue a completion certificate without any further delay, as per original completion date and to release the due amount of the Plaintiff Company immediately, but the Defendant Company used to find various excuses to show defects in the work done by the Plaintiff Company and asked to rectify the same. The Plaintiff Company submits that as per Clause 10.0 of the General Conditions of Contract, "If the Amount of Security Deposit Deduction in cash is more than Rs.10.00 (Rs. Ten Lacs Only), the excess amount can be refunded to Contractor against Submission of Bank Guarantee of equivalent Amount from a Nationalized Bank in the prescribed Performa of the Defendant Company", therefore, the Plaintiff Company vide their latter dated 5/1/2008 requested the Defendant Company to refund the said amount against the Bank Guarantee as per Clause 10.0 of the



Contract. The Plaintiff Company submits that, thereafter, the Plaintiff Company has again extended the Bank Guarantee of Rs. 55,85,000.00 (Rs. Fifty Five Lacs Eighty Five Thousand Only) till 02/02/2009 and forwarded the same vide their letter dated 07/02/2008 to the Defendant Company. The Plaintiff Company submits that, the Plaintiff Company from time to time have requested the Defendant Company to issue the completion Certificate and to release the payments, but the Defendant Company under one or another guise did not release the huge and legitimate payments of Plaintiff Company. The Plaintiff Company submits that, the Plaintiff Company lastly had requested the Director, Executive Director (Tech.) and Chairman & Managing Director of Defendant Company vide letters dated 25/4/2008 for release of payment of final bill, which is pending since long time, but the Defendant Company did not pay any heed as well did not release the payment to the Plaintiff Company.

9) The Plaintiff Company submits that, the Plaintiff Company has performed his part of the obligations as per the Agreement, and due to delay and hindrances on the part of the Defendant Company in performing their part of the obligations, The Plaintiff Company was constrained to ask for extension of time, which is not attributable by the Plaintiff Company. The Plaintiff Company submits that, the Plaintiff Company has filled in the tender considering various terms and conditions of the tender documents, Including Performance Guarantee, Security Deposit, Defect Liability Period, Payment terms of regular bills and final bill etc.. and as the Defendant Company failed to follow the conditions of the Agreement, the Plaintiff Company was put to a heavy losses under various heads such as, on account of release of Performance Bank Guarantee amounting to Rs.55,85,000.00 (Rs. Fifty Five Lacs Eighty Five Thousand Only), release of Security



Deposit/Retention Money of Rs 52,32,359.00 (Rs. Fifty Two Lacs Thirty Two Thousand Three Hundred Fifty Nice Only), release of final bill amount of Rs. 18,92,473.00 (Eighteen Lacs Ninety Two Thousand Four Hundred Seventy Three Only), on account of commercial loss amounting to Rs.1,42,57,075.41 (Rs. One Crore Forty Two Lacs Fifty Seven Thousand Seventy Five and Forty One Ps. Only), on account of loss on technical points amounting to Rs.1.12,85,762.00 (Rs. One Crore Twelve Lacs Eighty Five Thousand Seven Hundred Sixty Two Only), on account of price escalation amounting to Rs.70,63,213.00 (Rs. Seventy Lacs Sixty Three Thousand Two Hundred Thirteen Only), on account of actual loss amounting to Rs.1,58,56,762.00. (Rs. One Crore Fifty Eight Lacs Fifty Six: Thousand Seven Hundred Sixty Two Only) In all, the Plaintiff Company is entitled to get amount of Rs. 6,11,72,644.00 (Rs. Six Crore Eleven Lacs Seventy Two Thousand Six Hundred Forty Four Only) on various accounts from the Defendant Company of which details are attached herewith as per Annexure 2

11) Suit Valuation & Jurisdiction:

The claim in suit is valued as Rs.300.00 (Rs. Three Hundred Only) for the purpose of declaratory relief and the claim in suit for recovery of Rs. 6,11,72,644.00 (Rs. Six Crore Eleven Lacs Seventy Two Thousand Six Hundred Forty Four Only) is valued accordingly.

The Plaintiff Company accordingly pays court fees of Rs.75,100.00 (Rs. Seventy Five Thousand One Hundred Only) on the said claim and for purpose of Advocate Fees and Jurisdiction Suit is valued at same, and as both the Plaintiff Company and Defendant Company have their Office in Vadodara within the



limits of Vadodara and therefore, this Court has ample jurisdiction to try and entertain the present suit. "

16. The phrase ‘subject matter’ appearing under Order XXIII Rule 1 CPC has been explained by the Apex Court in Vallabh Das v. Madan Lal, (1970) 1 SCC 761, wherein the Apex Court has held as under:-

“5. Rule 1 of the Order 23, Code of Civil Procedure empowers the courts to permit a plaintiff to withdraw from the suit brought by him with liberty to institute a fresh suit in respect of the subject-matter of that suit on such terms as it thinks fit. The term imposed on the plaintiff in the previous suit was that before bringing a fresh suit on the same cause of action, he must pay the costs of the defendants. Therefore we have to see whether that condition governs the institution of the present suit. For deciding that question we have to see whether the suit from which this appeal arises is in respect of the same subject-matter that was in litigation in the previous suit. The expression “subject-matter” is not defined in the Civil Procedure Code. It does not mean property. That expression has a reference to a right in the property which the plaintiff seeks to enforce. That expression includes the cause of action and the relief claimed. Unless the cause of action and the relief claimed in the second suit are the same as in the first suit, it cannot be said, that the subject-matter of the second suit is the same as that in the previous suit. Now coming to the case before us in the first suit Dr Madan Lal was seeking to enforce his right to partition and separate possession. In the present suit he seeks to get possession of the suit properties from a trespasser on the basis of his title. In the first suit the cause of action was the division of status between Dr Madan Lal and his adoptive father and the relief claimed was the conversion of joint possession into separate possession. In the present suit the plaintiff is seeking possession of the suit properties



from a trespasser. In the first case his cause of action arose on the day he got separated from his family. In the present suit the cause of action, namely, the series of transactions which formed the basis of his title to the suit properties, arose on the death of his adoptive father and mother. It is true that both in the previous suit as well as in the present suit the factum and validity of adoption of Dr Madan Lal came up for decision. But that adoption was not the cause of action in the first nor is it the cause of action in the present suit. It was merely an antecedent event which conferred certain rights on him. Mere identity of some of the issues in the two suits do not bring about an identity of the subject-matter in the two suits. As observed in Rukhma Bai v. Mahadeo Narayan, [ILR 42 Bom 155] the expression “subject-matter” in Order 23 of the Rule 1, Code of Civil Procedure means the series of acts or transactions alleged to exist giving rise to the relief claimed. In other words “subject-matter” means the bundle of facts which have to be proved in order to entitle the plaintiff to the relief claimed by him. We accept as correct the observations of Wallis, C.J., in Singa Reddi v. Subba Reddi [ILR 39 Mad 987] that where the cause of action and the relief claimed in the second suit are not the same as the cause of action and the relief claimed in the first suit, the second suit cannot be considered to have been brought in respect of the same subject-matter as the first suit.”

(emphasis supplied)

17. A comparison of the two suits indicates that the claim amount in the Suit filed before the Vadodara High Court is Rs.6,11,72,644/- while the claim amount in the Suit filed before the Delhi High Court is Rs.8,21,64,607/- and the timeline of disputes in the Suit filed before the Vadodara High Court focuses on the issues during the year 2004-07 while



the Suit filed before the Delhi High Court expands the timeline to 2012. A comparison of the said plaint with the present plaint filed by the Plaintiff shows that the subject matter of the dispute primarily is the claims by the Plaintiff on account of delay in performing the work and non-payment of bills. The claim amount in vadodara suit was Rs.6,11,72,644/- and the claim amount in the present suit is Rs.8,21,64,607/- which includes certain additional claims like VAT, labour cess refunds, and overheads for an extended period. The only difference between the two suits is the timeline of disputes as the delay in Vadodara suit is shown from 2004 to 2007 whereas, the present suit includes the delay after issuance of completion certificate as well. A perusal of both the plaints discloses that the dispute has arisen out of the same Contract Agreement dated 20.12.2004. The dispute has primarily focused the delay on the part of the Defendant in making the payments to the Plaintiff and is therefore on the same subject matter.

18. It can be seen that the second suit which has been filed after six years after the withdrawal of the first suit only includes the time that has taken post withdrawal which does not change the subject matter. It is pertinent to mention that before the withdrawal of the first suit, a completion certificate was already issued to the Plaintiff and all the claims in the present suit which were not included in the earlier suit could have been included by the Plaintiff in the earlier suit as well. The delay in clearing those claims would not enlarge the scope of the suit. The first suit was, therefore, clearly on the same subject matter. Clever drafting alone cannot change the subject matter of the case.

19. Order XXIII Rule 1 (3) & (4) of the CPC reads as under:

“1. Withdrawal of suit or abandonment of part of



claim.—

xxx

(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.”

20. Order XXIII Rule 1(3) CPC provides that where a Court is satisfied that the suit must fail by a formal defect or when the Court finds that there is sufficient ground to institute a fresh suit for the subject matter or of a suit or a part of the claim, the Court can give permission to the Plaintiff to withdraw such suit or a part of the claim with liberty to file a fresh suit in



respect of the same subject matter or part of the claim. On the other hand, under Order XXIII Rule 1(4) CPC, a Plaintiff can abandon a suit or a part of the claim or can withdraw from a suit or a part of the claim without the permission as required under Order XXIII Rule 1(3) CPC. When a Plaintiff chooses to abandon a suit or part of the claim or withdraw from the suit without the permission, then the Plaintiff is precluded from instituting any fresh suit in respect of such subject matter or the part of the claim.

21. The purpose of Order XXIII Rule 1 (4) of CPC is that legal proceedings in respect of a subject matter are not stretched for unduly long period by allowing a party to re-agitate the same issue over and over again. The path for filing a fresh suit is, therefore, based on a public policy. The Apex Court in HPCL Bio-Fuels Ltd. vs. Shahaji Bhanudas Bhad, **2024 SCC OnLine SC 3190** has observed as under:

“39. Order 23 Rule 1, as it now stands post the amendment, makes a distinction between “abandonment” of a suit and “withdrawal” from a suit with permission to file a fresh suit and provides for - first, abandonment of suit or a part of claim; and secondly, withdrawal from suit or part of claim with the leave of the court. Abandonment of suit or a part of claim against all or any of the defendants is an absolute and unqualified right of a plaintiff and the court has no power to preclude the plaintiff from abandoning the suit or direct him to proceed with it. Sub-rule (1) of Order 23 Rule 1 embodies this principle. However, if the plaintiff abandons the suit or part of claim, then he is precluded from instituting a fresh suit in respect of such subject-matter or such part of claim. Upon abandoning the suit or part of claim, the plaintiff also becomes liable to pay such costs as may be imposed by the Court. This is specified under sub-rule (4) of Order 23 Rule 1.



40. However, if the plaintiff desires to withdraw from a suit or part of a claim with liberty to file a fresh suit on the same subject matter or part of the claim, then he must obtain the permission of the court under sub-rule (3) of Order 23 Rule 1. The failure to obtain such permission would preclude the plaintiff from instituting any fresh suit in respect of such subject-matter or such part of the claim, and also to any costs that may be imposed by the court.”
(emphasis supplied)

22. In the considered opinion of this Court, the present case comes under Order XXIII Rule (4) CPC and not under Order XXIII Rule (3) of the CPC. The Plaintiff has decided to abandon the Suit at Vadodara. The plaint was not returned by the Trial Court to file it before the Court of competent jurisdiction. The Plaintiff has not filed an application indicating that it intends to withdraw the Suit at Vadodara to file the Suit before the Court of competent jurisdiction since an objection has been raised by the Defendant that the Court lacks territorial jurisdiction. There is no finding by the Court that the suit must fail by a reason of formal defect and in the absence of both the reasons, the Court has not given any permission to withdraw the suit with liberty to institute a fresh suit in respect of the suit. As stated earlier, the Plaintiff has decided to abandon the suit and has withdrawn the suit without permission referred to under sub-Rule 3 of Rule 1 of Order XXIII CPC.

23. The Apex Court in the aforesaid Judgment HPCL Bio-Fuels (supra) has also discussed the applicability of principle under Order XXIII Rule 1 of CPC to writ petitions filed under Article 226 and 227 of the Constitution of India and has observed as under:



“47. A two-Judge Bench of this Court in *Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior* reported in (1987) 1 SCC 5 while elaborating upon the principle underlying Order 23 Rule 1 of CPC, extended them to writ petitions under Articles 226 and 227. Relevant observations from the said decision are as follows:

“7. [...] The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file fresh suit. Invito beneficium non datur — the law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of res judicata contained in Section 11 of the Code which provides that no court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. The rule of res judicata applies to a case where the suit or an issue has already been



heard and finally decided by a court. In the case of abandonment or withdrawal of a suit without the permission of the court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in sub-rule (4) of Rule 1 of Order XXIII of the Code when the first suit is withdrawn without the permission referred to in sub-rule (3) in order to prevent the abuse of the process of the court.

8. The question for our consideration is whether it would or would not advance the cause of justice if the principle underlying Rule 1 of Order XXIII of the Code is adopted in respect of writ petitions filed under Articles 226/227 of the Constitution of India also. It is common knowledge that very often after a writ petition is heard for some time when the petitioner or his counsel finds that the court is not likely to pass an order admitting the petition, request is made by the petitioner or by his counsel to permit the petitioner to withdraw from the writ petition without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit the withdrawal of the petition. It is plain that when once a writ petition filed in a High Court is withdrawn by the petitioner himself he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court."

(Emphasis supplied)

48. The principles enunciated in Sarguja Transport (supra) were extended to Special Leave Petitions filed before this Court by a two-Judge Bench of this Court in Upadhyay & Co. v. State of U.P. reported in (1999) 1 SCC 81. It was observed by the bench thus:



11. [...] It is not a permissible practice to challenge the same order over again after withdrawing the special leave petition without obtaining permission of the court for withdrawing it with liberty to move for special leave again subsequently.

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13. The aforesaid ban for filing a fresh suit is based on public policy. This Court has made the said rule of public policy applicable to jurisdiction under Article 226 of the Constitution (Sarguja Transport Service v. STAT [(1987) 1 SCC 5). The reasoning for adopting it in writ jurisdiction is that very often it happens, when the petitioner or his counsel finds that the court is not likely to pass an order admitting the writ petition after it is heard for some time, that a request is made by the petitioner or his counsel to permit him to withdraw it without seeking permission to institute a fresh writ petition. A court which is unwilling to admit the petition would not ordinarily grant liberty to file a fresh petition while it may just agree to permit withdrawal of the petition. When once a writ petition filed in a High Court is withdrawn by the party concerned, he is precluded from filing an appeal against the order passed in the writ petition because he cannot be considered as a party aggrieved by the order passed by the High Court. If so, he cannot file a fresh petition for the same cause once again. [...]

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15. We have no doubt that the above rule of public policy, for the very same reasoning, should apply to special leave petitions filed under Article 136 of the Constitution also. [...]"(Emphasis supplied)"



24. Applying the aforesaid principles to the facts of the present case, the suit filed in Vadodara and the present suit are on the very same subject matter. Only by virtue of clever drafting, the period of claim has been extended. The Defendant in the present suit did file an application before the Court at Vadodara that it did not have territorial jurisdiction which as stated in Sneh Lata Goel (supra) is different from subject matter jurisdiction. Paragraph Nos.18, 19 and 20 of the said Judgment reads as under:

“18. The Court in Kiran Singh case [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340] disallowed the objection to jurisdiction on the ground that no objection was raised at the first instance and that the party filing the suit was precluded from raising an objection to jurisdiction of that court at the appellate stage. This Court concluded thus : (AIR p. 345, para 16)

“16. ... If the law were that the decree of a court which would have had no jurisdiction over the suit or appeal but for the overvaluation or undervaluation should be treated as a nullity, then of course, they would not be estopped from setting up want of jurisdiction in the court by the fact of their having themselves invoked it. That, however, is not the position under Section 11 of the Suits Valuation Act.”

Thus, where the defect in jurisdiction is of kind which falls within Section 21 CPC or Section 11 of the Suits Valuation Act, 1887, an objection to jurisdiction cannot be raised except in the manner and subject to the conditions mentioned thereunder. Far from helping the case of the respondent, the judgment in Kiran Singh [Kiran Singh v. Chaman Paswan, AIR 1954 SC 340] holds that an objection to territorial jurisdiction and pecuniary jurisdiction is different from an objection to jurisdiction over the subject-matter. An



objection to the want of territorial jurisdiction does not travel to the root of or to the inherent lack of jurisdiction of a civil court to entertain the suit.

19. In Hira Lal Patni v. Kali Nath [Hira Lal Patni v. Kali Nath, AIR 1962 SC 199] , a person filed a suit on the original side of the High Court of Judicature at Bombay for recovering commission due to him. The matter was referred to arbitration and it resulted in an award in favour of the plaintiff. A decree was passed in terms of the award and was eventually incorporated in a decree of the High Court. In execution proceedings, the judgment-debtor resisted it on the ground that no part of the cause of action had arisen in Bombay, and therefore, the High Court had no jurisdiction to try the cause and that all proceedings following thereon were wholly without jurisdiction and thus a nullity. Rejecting this contention, a four-Judge Bench of this Court held thus : (AIR p. 201, para 4)

“4. The objection to its [Bombay High Court] territorial jurisdiction is one which does not go to the competence of the court and can, therefore, be waived. In the instant case, when the plaintiff obtained the leave of the Bombay High Court on the original side, under Clause 12 of the Letters Patent, the correctness of the procedure or of the order granting the leave could be questioned by the defendant or the objection could be waived by him. When he agreed to refer the matter to arbitration through court, he would be deemed to have waived his objection to the territorial jurisdiction of the court, raised by him in his written statement. It is well settled that the objection as to local jurisdiction of a court does not stand on the same footing as an objection to the competence of a court to try a case. Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is a



case of inherent lack of jurisdiction. On the other hand, an objection as to the local jurisdiction of a court can be waived and this principle has been given a statutory recognition by enactments like Section 21 of the Code of Civil Procedure.”

(emphasis supplied)

20. In Harshad Chimman Lal Modi v. DLF Universal Ltd. [Harshad Chimman Lal Modi v. DLF Universal Ltd., (2005) 7 SCC 791] , this Court held that an objection to territorial and pecuniary jurisdiction has to be taken at the earliest possible opportunity. If it is not raised at the earliest, it cannot be allowed to be taken at a subsequent stage. This Court held thus : (SCC pp. 803-04, para 30)

“30. ... The jurisdiction of a court may be classified into several categories. The important categories are (i) territorial or local jurisdiction; (ii) pecuniary jurisdiction; and (iii) jurisdiction over the subject-matter. So far as territorial and pecuniary jurisdictions are concerned, objection to such jurisdiction has to be taken at the earliest possible opportunity and in any case at or before settlement of issues. The law is well settled on the point that if such objection is not taken at the earliest, it cannot be allowed to be taken at a subsequent stage. Jurisdiction as to subject-matter, however, is totally distinct and stands on a different footing. Where a court has no jurisdiction over the subject-matter of the suit by reason of any limitation imposed by statute, charter or commission, it cannot take up the cause or matter. An order passed by a court having no jurisdiction is a nullity.” (emphasis supplied)

25. The judgment of Kiran Singh (supra) relied on by the Plaintiff therefore would not apply in the facts of the present case and this Court



respectfully disagrees with the ratio of the judgment passed by the learned Single Judge of the Gauhati High Court in Violet Mawrire (supra).

26. Had the Defendant not raised the objection of territorial jurisdiction, it was well open for the Civil Court at Vadodara to proceed further. The Plaintiff moved an application for withdrawal of the suit. The application for withdrawal of suit does not indicate that the application for withdrawal has been filed on the ground that the Court at Vadodara does not have the territorial jurisdiction to entertain the Suit. The application only states that due to change of cause of action, the Plaintiff seeks leave to withdraw the suit unconditionally for which necessary leave be granted and in view of that prayer, the Plaintiff was permitted to withdraw the suit unconditionally. The endorsement in the Order permitting withdrawal clearly shows that the Plaintiff is not interested in proceeding with the matter further and has proceeded to withdraw the suit unconditionally and the suit is disposed of accordingly. These events show that there was no inclination on the part of the Plaintiff to withdraw the suit and file a fresh suit on the same subject matter before the Court of competent jurisdiction. The Plaintiff's intention was only to withdraw the suit.

27. As pointed by the Apex Court in HPCL Bio-Fuels (supra), the present case is one under Order XXIII Rule 1(4)(b) of CPC. It is not the case that the Court had permitted the Plaintiff to withdraw the first suit as it was satisfied that the suit had to fail by reason of some formal defect or that there were sufficient grounds for allowing the Plaintiff to institute a fresh suit for the same subject matter or part of a claim or that the Plaintiff had prayed for a liberty to institute a fresh suit on the same subject matter. The present case is one where the Plaintiff had decided to abandon the suit. As rightly held by



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the Apex Court that there is a difference between abandonment and withdrawal. The present case is squarely a case of abandonment of the suit on the ground that there was a change of cause of action. The Plaintiff chose to withdraw the suit unconditionally which was permitted by the Court.

28. In view of the above, the present suit is clearly barred under Order XXIII Rule 1(4)(b) of CPC. Accordingly, the suit is dismissed, along with pending application(s), if any,

SUBRAMONIUM PRASAD, J

JANUARY 07, 2025

S. Zakir