

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION**

CIVIL APPEAL NO. 5527 OF 2008
(Arising out of S.L.P. (C) No.8709/2004)

Sadhna Jain & Anr. ...Appellants

Versus

**Sheikh Khalikuzzama(d) By ...Respondents
Lrs. & Ors.**

O R D E R

Although, notices had not been served upon respondent Nos. 7 to 10 and 20 & 21, it is stated by Mr. K.V. Viswanathan, learned counsel appearing for the petitioners that the plaintiffs having been served with the notice and they are appearing, it is not necessary for the disposal of the appeal to serve respondent Nos. 7 to 10 and 20 & 21.

In view of the statement made by Mr. K.V. Viswanathan, service of notice upon the unserved respondents is waived.

Leave granted.

This appeal is directed against the judgment and order dated 4.3.2004 passed by a Division Bench of the High Court of judicature at Allahabad in First Appeal NO. 356 of 2004 whereby and whereunder leave to withdraw the suit filed by the plaintiff-respondents herein has been granted, upon setting aside the decree passed by the learned trial Judge in Suit No. 177 of 1995.

The plaintiff-respondents filed the aforementioned Suit for injunction and declaration before the Civil Judge, Mirzapur.

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In the year 1999 the appellants herein were impleaded as parties. Both parties adduced evidence. When the Suit was fixed for argument, an application seeking permission to withdraw the suit and file a fresh suit, on the ground that the appellants have purchased the property and therefore different

reliefs have to be claimed in a fresh suit, was filed. The said application was dismissed by an order dated 30.9.2003, observing:

"..But the Plaintiffs have not moved this application only with the motive to harass the defendants. His application is moved at the stage of Judgment. For the submissions and facts argued by the defendants I Perused the order sheet Plaintiff and find that the present suit was filed by Plaintiffs in the year 1995 for permanent injunction and during pendency of the suit in the year 1999 Plaintiffs arrayed alleged purchasers and parties and plaintiffs have continued the said suit on same facts, if according to plaintiffs due to alleged transfer the circumstances of the suit was changed then the steps for withdrawal of suit should have been taken at that time, but Plaintiffs adduced their evidence and forced defendants to adduce their evidence and suit was fixed for a final arguments for final disposal of the suit."

Thereafter, on or about 7.10.2003, another application was filed for withdrawal of the Suit. The said application was also dismissed. The plaintiff-respondents filed a Civil Revision No. 786/2003 thereagainst before the Allahabad High Court. It is stated at the Bar that the said revision application is still pending.

On or about 6.12.2003, the learned Trial Judge dismissed the suit. A First Appeal was preferred thereagainst.

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The said appeal has been allowed by reason of the impugned judgment stating:

" The position would be different where the suit has already been decreed and the prayer for withdrawal of the suit is made in a pending appeal, when a judgment is delivered certain rights and liabilities accrue, and hence there is no unconditional right in the plaintiff to withdraw the suit before the appellate court. It is the discretion of the appellate court to allow or not to allow withdrawal of the suit, though of course in view of Order 23 Rule 1(4) C.P.C. the trial Court can impose costs on the plaintiff and the plaintiff is precluded from instituting any fresh suit in respect of the subject matter. However, once an application for unconditional withdrawal of the suit is filed, the Court has no right thereafter to proceed and pronounce judgment

on the merit of the case.

For the reasons stated above, this appeal is allowed. The impugned judgment dated 9.12.2003 is set aside and the suit is dismissed with costs."

Mr.K.V.Viswanathan, learned counsel appearing on behalf of the appellants would submit that the High Court has committed a serious error in passing the impugned judgment as it has failed to take into consideration the fact that the prayer for withdrawal of the Suit had been dismissed by the learned trial Judge for the second time by the aforementioned order dated 7.10.2003 and in view of the fact that the civil revision application theragainst has been filed, the High Court could not have passed the impugned order.

Although, the High Court apparently appears to have made inconsistent orders insofar as on the one hand it has allowed the appeal and on the other hand dismissed the suit but upon a fair reading of the entire order, we are of the opinion that by reason thereof, the High Court merely permitted the plaintiff-respondents to withdraw the suit with liberty to file a fresh suit subject to the conditions mentioned therein.

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The judgment of the High Court, in our opinion, cannot be sustained for more than one reason; firstly, no application was filed for withdrawal of the suit and secondly the plaintiff-respondents might have merely brought to its notice that it had filed such an application before the learned trial Judge but it appears from the impugned judgment that the attention of the High Court was not drawn to the fact that the application has already been dismissed and civil revision thereagainst has been filed.

In that view of the matter, the High Court could not have permitted the appellants to withdraw the suit with liberty granted to file a fresh suit until and unless a prayer therefor was made.

For the reasons aforementioned, we set aside the impugned judgment and remit the matter back to the High Court for consideration of the same afresh.

The appeal is allowed. No costs.

[S.B. SINHA]

.....J.

[CYRIAC JOSEPH]

.....J

**New Delhi,
September 1, 2008.**