

**IA No. GA 4 of 2020**  
**Old No. 1709 of 2019**  
**In**  
**CS 265 of 2016**  
**IN THE HIGH COURT AT CALCUTTA**  
**Ordinary Original Civil Jurisdiction**  
**Original Side**  
**Mahesh Properties Pvt. Ltd.**  
**Vs.**  
**Partha Pratim Majra & Anr.**

For the Petitioner : Mr. S.N. Mitra, Sr. Advocate  
Mr. Debjit Mukherjee, Advocate  
Mr. Sanjay Mukherjee, Advocate  
Mr. Lal Ratan Mandal, Advocate  
Ms. Susmita Chatterjee, Advocate  
Mr. K. Bhattacharya, Advocate

For the Respondents : Mr. P. Ghosh, Advocate

Hearing concluded on : January 19, 2021

Judgment on : January 27, 2021

**DEBANGSU BASAK, J. :-**

1. The executor of the last will and testament of Kiran Wadan Bhagat, since deceased has applied for withdrawal of the proceedings being PLA No. 143 of 2016, non-prosecution of the same by the executor with the liberty to file afresh before the court of law having jurisdiction to

entertain an application for grant of probate of the last will and testament of the deceased dated November 20, 2002.

2. Learned Advocate appearing for the executor has submitted that, the executor is no longer willing to proceed with the probate proceedings before this Hon'ble Court. He has submitted that, there is a probate proceeding pending before the Barasat Court. It is therefore just and proper that the executor be permitted to withdraw the probate application and file a proceeding for probate before the district delegate at Barasat.

3. Learned Senior Advocate appearing on behalf of a purchaser of an immovable property has submitted that, his client had purchased the immovable property which is one of the immovable properties referred to in the will, by a registered deed of conveyance dated May 5, 2002. He has submitted that, the executor knew of the right, title and interest of the purchaser in the immovable property concerned. The purchaser along with two others had purchased the immovable property by the registered deed of conveyance dated July 5, 2005. Nonetheless, the executor did not have any citation issued about the proceedings being PLA No. 143 of 2017 to such purchasers. The executor had obtained a probate on July

14, 2017 of the will without having the necessary citation issued to the purchasers. The purchasers of upon coming to know about the probate proceeding and the probate granted had filed an application under section 263 of the Indian Succession Act, 1925 for revocation of the probate dated July 14, 2017. By an order dated June 25, 2020, such probate had been revoked.

4. Learned Senior Advocate appearing for the purchaser has submitted that, the application for non-prosecution is mala fide. This Hon'ble Court does not suffer from lack of jurisdiction to try, entertain and determine the application for grant of probate. He has referred to Order XXIII Rule 1 of the Code of Civil Procedure, 1908. He has submitted that since the executor has not asked for unconditional leave to withdraw the proceedings, the executor is not entitled to have the proceedings withdrawn with the leave as prayed for. In support of his contentions Learned Senior Advocate appearing for the purchaser has relied upon **1910 (11) Calcutta Law Journal 45 (Kharda Co. Ltd. v. Durga Charan Chandra)**, **2017 Volume 5 Supreme Court Cases 63 (V. Rajendran & Anr. v. Annasamy Pandian (Dead) Through Legal Representatives Karthyayani Natchiar)** and **2000 Volume 5 Supreme Court Cases 458 (K.S. Bhoopathy v. Kokila)**. He has

submitted, that, there is a probate proceeding pending before the Barasat District Delegate which involves a different will. There is also a suit pending before the Sealdah Court.

5. The parties have referred to Order XXIII Rule (1) and 1(4) which are as follows: –

***"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.*

***1(3) 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 preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim."*

6. The Division Bench in ***Kharda Co. Ltd. (supra)***, has considered Order 23 Rule 1 of the Code of Civil Procedure, 1908 prior to its amendment. It has held as follows:

*“Rule 1, Sub-rule (2) of Order 23 provides that where the Court is satisfied, (a) that a suit must fail by reason of some formal defect, or (b) that there are other 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 abandon 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 a claim. It is manifest that Clauses (a) and (b) of Sub-rule 2 have to be read together; but it is suggested by the learned Vakil for the plaintiff that the terms of Clause (b) are wide enough to entitle the Court to allow the plaintiff to withdraw from the suit under any circumstances that may be deemed sufficient by the Court. We are not prepared to accept this as the true interpretation of the clause. Clause (a) specifies that a suit may be allowed to be withdrawn if the Court is satisfied that it must fail by reason of some formal defect. Clause (b) then proceeds to lay down that a similar order may be made for any other sufficient ground. The intention plainly is that a ground included in Clause (b) must be of the same nature as the ground specified in Clause (a).”*

7. In **K.S. Bhoopathy (supra)** the Supreme Court has considered Order XXIII Rule 1 of the Code of Civil Procedure, 1908 and held as follows: –

*“11. The present Rule which was introduced in place of the old Rule 1 by the Amendment Act of 1976 makes a distinction between absolute withdrawal which is termed as “abandonment” and withdrawal with the permission of the court. This clear distinction is maintained throughout in the substituted Rule by making appropriate changes in the wording of various sub-rules of Rule 1.*

*12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:*

*(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and*

*(b) a plaintiff may, in the circumstances mentioned in sub-rule (3), be permitted by the court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty*

*being granted by the court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11 CPC.*

**13.** *The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting*

*the party to start a fresh round of litigation on the same cause of action. This becomes all the more important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the court or courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The appellate/second appellate court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1(3) CPC for exercise of the discretionary power in permitting the withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the appellate/second appellate stage results in wastage of public time of courts which is of considerable importance in the present time in view of large accumulation of cases in lower courts and inordinate delay in disposal of the cases.”*

8. The Supreme Court has considered **K.S. Bhoopathy (supra)** in **V. Rajendran & Anr. (supra)** and held as follows :-

*“9. Learned counsel appearing for the plaintiff-respondents on the other hand submitted that the High Court heard both the parties before granting the application for withdrawal of the suit with leave to file a fresh suit, and therefore, no exception can be taken to the order that it was premature. It was the further submission of the learned counsel that Order XXIII Rule 1(3) vests wide discretion in the court to grant permission for withdrawal of the suit with leave to file a fresh suit and such discretion having been exercised by the High Court in favour of the applicants the order is not liable to be interfered by this Court in exercise of jurisdiction under Article 136 of the Constitution.”*

9. Order XXIII of the Code of 1908 has dealt with withdrawals and adjustments of suits. As the authorities cited by the parties, have noted that, there are distinctions between Order XXIII Rule 1(1) and Order XXIII Rule 1(3) of the Code of 1908. Under Order XXIII Rule 1(1), a plaintiff is entitled to abandon his suit or abandon a part of his claim as against the defendant or any of the defendants. However, when the plaintiff in a suit seeks leave to withdraw the suit to file afresh on the self-same cause of action, then, Order XXIII Rule 1 (3) comes into operation. Order XXIII Rule 1(3) of the Code 1908 has prescribed that, the Court must be satisfied that, the suit must be filed by reason of some

formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or a part of the claim. On such satisfaction being returned, the Court may grant the plaintiff permission to withdraw 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.

10. The executor herein is seeking to withdraw the probate proceedings with liberty to file afresh before any other court. Therefore, the present application is governed by Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908.

11. The executor had applied for grant of probate of the will of Kiran Wadan Bhagat since deceased. Kiran Wadan Bhagat, since deceased was one of the sons of Late Lajpat Rai Bhagat. Late Lajpat Rai Bhagat was the sole and absolute owner of 7 bighas of land lying at Panihati Municipality, District North 24 Parganas. Late Lajpat Rai Bhagat had died intestate leaving behind his widow Jagjit Bhagat, three sons namely Kiran Wadan Bhagat, Ravi Wadan Bhagat and Laj Wadan Bhagat and one daughter Hemi Kapoor. The widow of Late Lajpat Rai Bhagat died leaving the three sons and one daughter as his heirs and legal

representatives. Consequently, the three sons and the daughter of Late Lajpat Rai Bhagat and Late Jagjit Bhagat each became one fourth owner in respect of the immovable property. The eldest son of Late Lajpat Rai Bhagat namely, Kiran Wadan Bhagat died on February 6, 2005 leaving him surviving by his son Ajay Bhagat and four daughters Anita Singh, Sunita Singh, Kabita Sinigh and Debika Dhirani. The wife of Late Kiran Wadan Bhagat had predeceased her husband. After the death of Kiran Wadan Bhagat since deceased, his four daughters had executed a registered power of attorney dated June 20, 2005 and appointed their brother Ajay Wadan as their lawful and constituted attorney. Ajay Wadan and Ravi Wadan had transferred one half share of the property to various persons one of whom is the purchaser herein. The names of such purchasers had been duly recorded in the Record of rights as well as in the Municipal Register. By a registered deed of conveyance dated December 5, 2012, the son of Late Lajpat Rai Bhagat had conveyed his undivided one fourth share in the property in favour of companies all controlled by the purchasers from Ravi Wadan and Ajay Bhagat. The daughter of Late Lajpat Rai Bhagat conveyed her one fourth share on March 15, 2013. The purchaser therefore, can be said to have an interest in the immovable property. The father of the executor had filed a suit

being Title Suit No. 171 of 2016 before the learned Civil Judge (Junior Division), 4<sup>th</sup> Court at Sealdah against the purchasers claiming inter alia for a decree of declaration with the deed of conveyance dated July 5, 2005 executed by Ravi Wadan and the daughters of Kiran Wadan is null and void and not binding upon the plaintiff. The father of the executor had claimed that by virtue of a probate granted by the learned District Delegate at Barrackpore District, North 24 Parganas of the Will of Ravi Wadan, he is the owner of the suit property. The executor had applied for grant of probate of the Will dated November 20, 2002 of Late Kiran Wadan Bhagat. This Hon'ble Court had granted probate of such Will on July 14, 2007. The purchaser along with other had applied for revocation of such probate by GA No. 3060 of 2017 PLA 143 of 2016 which had been allowed by the judgment and order dated June 25, 2020. The facts as narrated hereinabove have been gathered from the judgment and order dated June 25, 2020.

12. In the facts of the present case, the executor has not claimed that, there is any formal defect in the probate proceedings filed by the executor. The application for withdrawal, has not specified any ground far less sufficient ground for allowing the executor to institute a fresh suit for the subject matter. In such circumstances, since neither of the

two limbs of Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908 have been satisfied by the executor, an unconditional leave to withdraw the proceedings to be filed before any other Court, cannot be granted as has been prayed for.

13. In such circumstances, the present application being IA GA No. 4 of 2020 in PLA 143 of 2016 is dismissed. No order as to costs.

**[DEBANGSU BASAK, J.]**