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aforesaid. We accept this application, and direct that the judgement be amended by the insertion of the express words directing the sale of the property in suit subject to the prior mortgage of this petitioner, and that consequential amendments be made in the preliminary decree for sale, as also in the decree absolute. As we think that the petitioner might have been more watchful over his own interest and should have taken action earlier than he did, we direct that he do bear the costs of the opposite side in the present proceedings both here and in the court below.

Application granted.

Before Mr. Justice Chamier and Mr. Justice Piggott.

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March, 10.

AFZAL BEGAM (DEFENDANT) *v.* AKBARI KHANUM AND OTHERS (PLAINTIFFS).*

Civil Procedure Code (1908), order XXIII, rule 1—Appellate court, powers of—Withdrawal of suit.

Held that an appellate court can, under order XXIII, rule 1, of the Code of Civil Procedure (1908), give a plaintiff whose suit has been dismissed by the court of first instance permission to withdraw his suit and give him leave to institute a fresh one. *Ganga Ram* v. *Data Ram* (1) followed. *Choragudi Chinna Kotayya* v. *Raja Varada Raja Appa Row* (2) and *Eknath* v. *Ranoji* (3) dissented from.

THE facts of this case were as follows :—

The plaintiff brought a suit for partition of property which originally belonged to one Moti Begam. She omitted to implead certain heirs of her as defendants. The contesting defendants took an objection on this score and urged that the suit was not maintainable. No issue, however, was framed with respect to it and ultimately the court set apart the share of those heirs and gave the plaintiff a decree for her share in the remainder. The plaintiff appealed as regards the part of her claim which had been disallowed and the contesting defendants preferred a cross-objection again raising the plea that the suit was not maintainable for non-joinder of necesssary parties. Thereupon the plaintiff applied to the appellate court saying that as her suit might fail by reason of a formal defect, she prayed for permission to withdraw the suit with liberty to bring a fresh suit. The appellate court granted the application. The defendant filed a revision in the High Court from that order.

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*Civil Revision No. 157 of 1914.

(1) (1885) I. L. R., 8 All., 82. (2) (1914) 27 M. L. J., 244.

(3) (1911) I. L. R., 35 Bom., 261.

Dr. *S. M. Sulaiman*, for the applicant:—

The powers conferred by order XXIII, rule 1, clause (2) on courts to permit a plaintiff to withdraw a suit with liberty to institute a fresh suit are exercisable only so long as the suit has not proceeded to a decree. It is beyond the jurisdiction of an appellate court to grant such permission after the defendant has obtained a decree wholly or partly in his favour. The words of order XXIII, rule 1, as they stand, refer only to original suits which have not yet been disposed of. So far as the withdrawal of a suit is concerned, as distinguished from the withdrawal only of the appeal, none of the clauses of that rule can apply to an appellate court. For, if the rule can so apply at all the whole rule must apply and not only a portion. Now, clause (1) cannot apply because a plaintiff cannot abandon his suit after once a decree has been passed; thereafter the rights of the parties are merged in the decree. And if clause (1) cannot apply then clause (2) cannot, for it only gives power to the court to give liberty to bring a fresh suit in a case where the plaintiff can withdraw or abandon his claim. *Choragudi China Kotayya* v. *Raja Varada Raja Appa Row* (1) where the various clauses of the rule have been exhaustively analysed and discussed. *Ghazanfar Husain* v. *Ram Ratan Lal* (2) and *Eknath* v. *Ranoji* (3). The ruling in *Ganga Ram* v. *Data Ram* (4) is against the defendant. But that case was decided under section 373 of the old Civil Procedure Code; the language of that section has been altered and re-cast by the present rule. There are other reported cases in which an appellate court has permitted the plaintiff to withdraw his suit with liberty to bring a fresh suit, but there the point was not directly taken or decided The next question is, assuming that an appellate court has power to permit the plaintiff-appellant to withdraw his suit, whether in the present case the court has rightly exercised that power. The question whether or not there were sufficient grounds in law to justify the action of the court in permitting the withdrawal of the suit with liberty to bring a fresh suit is one on which the High Court can interfere in revision,

(1) (1914) 27 M. L. J., 244.
(2) (1913) 20 I. C., 17.
(3) (1911) I. L. R., 35 Bom., 261.
(4) (1885) I. L. R., 8 All., 82.

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Manbhari v. *Sumer Chand* (1), *Khub Chand* v. *Ajodhya Prasad* (2), *Radha Rowan* v. *Tula Ram* (3) and *Hira Lal Mitra* v. *Udoy Chandra* (4). In the present case the Judge granted the permission to withdraw because he thought that the suit might fail by reason of the formal defect of non-joinder. That was not sufficient within the meaning of order XXIII, rule 1, which requires the court to be satisfied that the suit *must* fail by reason of the formal defect. Besides, the suit could not fail by reason of non-joinder of some of the parties; order I, rule 9. At the most shares of those parties would be excluded from partition, as was done by the first court; the suit could not be dismissed. The order of the lower court was, therefore, not justified by sufficient grounds in law.

Mr. *S. A. Haidar*, for the opposite party, was not called upon.

CHAMIER and PIGGOTT, JJ.—This is an application for revision of an order passed by the District Judge of Bareilly under Order XXIII, rule 1, clause (2) allowing the plaintiff to withdraw from the suit and giving her liberty to institute a fresh suit in respect of the same subject matter. It is contended that the learned Judge had no power to act under this rule because it is only the court of first instance that can allow the plaintiff to withdraw the suit and give him or her permission to institute a fresh suit. The applicant relies upon the decision of the Madras High Court in *Choragudi China Kotayya* v. *Raja Varada Raja Appa Row* (5) and the decision of the Bombay High Court in *Eknath* v. *Ranoji* (6). These two decisions certainly support the contention advanced on behalf of the applicant, but as long ago as 1885 this Court in *Ganga Ram* v. *Data Ram* (7), decided that an appellate court could under section 373 of the Code of Civil Procedure, 1882, give a plaintiff, whose suit had been dismissed by the court of first instance, permission to withdraw his suit and give him leave to institute a fresh one. The decision in that case was based on some earlier decisions of the Calcutta High Court, under the corresponding provision in the Code of Civil Procedure, 1859. So far as we are aware the correctness of the decision of this Court has never been challenged in this Court, and we

(1) (1914) 12 A. L. J., 441.
(2) (1913) 11 A. L. J., 783.
(3) (1912) 10 A. L. J., 893.
(4) (1912) 16 C. W. N., 1027.
(5) (1914) 27 M. L. J., 244.
(6) (1911) I. L. R., 35 Bom., 261.
(7) (1885) I. L. R., 8 All., 82.

believe that when the new Code of Civil Procedure was passed there was no reported decision to the effect that the appellate court could not give such permission. All the reported cases were in favour of the view that the appellate court could give such permission. Indeed, courts had gone further and held that a court executing a decree could give such permission. Order XXIII, rule 4, distinctly lays down that nothing in the Order shall apply to any proceedings in execution of a decree or order, thereby superseding the decision that a court executing a decree could give such permission. The language of Order XXIII, rule 1, is not exactly the same as that of section 373 of the Code of Civil Procedure of 1882. The provisions of the enactment have been re-arranged; but we do not think that the re-arrangement indicates any intention to lay down that an appellate court is not to give such permission. We do not think that sufficient ground has been shown for departing from the long continued practice of this province founded upon the decision of this Court in *Ganga Ram* v. *Data Ram* (1). A good deal may no doubt be said against the view taken by this Court; but the ruling has stood unchallenged for many years and we shall only introduce confusion if we depart from it now. There are several reported cases in which the lower appellate court has given the plaintiff permission to withdraw from the suit and file a fresh suit and such orders have been attacked on various grounds; but so far as we know, it has never been contended here since 1885 that an appellate court has no power to grant such permission. We propose to adhere to the decision of this Court.

Then it is contended that even if the District Judge had jurisdiction to act under Order XXIII, rule 1, he has exercised his jurisdiction in an unreasonable way, that he has not found that the suit would fail on account of a formal defect, and that the ground given by the District Judge is really no ground for allowing the plaintiff to withdraw from the suit. The suit was one for partition of property which originally belonged to one Moti Begam. One of the children of Moti Begam was Kamini Begam, who was married to a man named Khadim Ali. Several members of the family were impleaded as defendants to the suit, but the heirs of

(1) (1885) I. L. R., 8 All. 82.

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Khadim Ali, who was dead, were not impleaded. In her written statement the first defendant to the suit distinctly pleaded that as Khadim Ali's heirs were not parties to the suit, the suit could not proceed. This plea appears to have escaped the attention of the Subordinate Judge, when he was fixing issues, with the result that no specific issue was fixed regarding it. But at the time of argument, the Subordinate Judge was asked to decide, behind the back of Khadim Ali's heirs, that they had no right to the estate. He declined to do this, but set apart what he considered to be Khadim Ali's share, and gave the plaintiff a decree for partition of her share in the remainder of the property. The plaintiff appealed, contending that her entire claim should have been decreed. The first defendant filed cross-objections, one of which was that all the necessary parties had not been impleaded, and that the suit should have been dismissed. Thereupon the plaintiff presented a petition to the District Judge saying that it was by mistake that she had failed to implead the heirs of Khadim Ali, that the first defendant had pleaded that the suit could not proceed in their absence and had reiterated this objection in her memorandum of objections in the appellate court, and that she was afraid that her suit and appeal would be dismissed on this ground, she therefore prayed for permission to withdraw from the suit and bring another suit. The District Judge, rightly or wrongly, held that as the suit was one for partition, non-joinder of necessary parties might result in its being dismissed, and he pointed out that a complete partition of the property could not be effected in the absence of Khadim Ali's heirs, and he came to the conclusion that a fair ground had been made out for allowing the plaintiff to withdraw from the suit. It may be that we should not have taken the same view as the District Judge took of the non-joinder of Khadim Ali's heirs. It might have been possible to hold that the suit could proceed in their absence so far as the rest of the property was concerned; but this is not an appeal, and it seems to us impossible to say that the District Judge, in arriving at his decision that permission to withdraw the suit should be given to the plaintiff, has acted illegally or with material irregularity. We are, therefore, unable to interfere with the decision of the District Judge. We dismiss this application with costs.

Application dismissed.