

## APPELLATE CIVIL.

*Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.*

EKNATH BIN RANOJI FALKE (ORIGINAL DEFENDANT), APPLICANT, *v.*  
RANOJI BIN BOWAJI FALKE (ORIGINAL PLAINTIFF), OPPONENT.\*

1911.  
February 14.

*Civil Procedure Code (Act V of 1908), Order XXIII, Order XLI, Rule 11—Suit to recover possession—Dismissal of suit—Appeal—Application for withdrawal of suit with leave to bring a fresh suit—Power of the Court.*

Plaintiff's suit to recover possession of lands having been dismissed by the first Court, he appealed to the District Court and, before the admission of the appeal, he applied to that Court for leave to withdraw the suit and bring a fresh suit. The application was heard and granted by the District Judge without any notice to the defendant. The defendant having applied for revision, under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908), of the order granting the withdrawal,

*Held*, setting aside the order, that it was beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant had obtained a decree in his favour.

APPLICATION under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908) against an order passed by H. L. Hervey, District Judge of Sholapur, granting leave to withdraw a suit in appeal before the admission of the appeal and without giving notice to the defendant, the suit being dismissed by G. M. Pandit, Subordinate Judge of Karmala.

The plaintiff sued the defendant, his son, to recover possession of certain lands, alleging that owing to the plaintiff's old age and weakness, he had surrendered the lands to the defendant on his agreeing to pay to the plaintiff an annual allowance of Rs. 50 for his maintenance but the defendant failed to carry out the agreement. Hence the suit.

The defendant admitted the agreement with respect to the payment of maintenance and contended *inter alia* that the plaintiff having relinquished all his interests in the lands he was not entitled to recover them and that he had offered the amount of maintenance to the plaintiff but he refused to accept it.

\* Application No. 221 of 1910 under extraordinary jurisdiction.

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The Subordinate Judge found that the plaintiff had made over the lands to the defendant on his having agreed to pay to the plaintiff Rs. 50 annually for his maintenance, that the defendant had not broken his part of the agreement; therefore the plaintiff could not claim back the lands and that the plaintiff was entitled to maintenance only. The suit was, therefore, dismissed.

The plaintiff appealed to the District Court but before the appeal was admitted he applied for leave to withdraw the suit with liberty to bring a fresh suit, and the District Judge passed the following order:—

Appeal dismissed with costs, plaintiff (appellant) having been granted permission to withdraw from the suit with liberty to institute a fresh suit (see Exhibit 7 in appeal).

The defendant applied for the revision of the said order under the extraordinary jurisdiction (section 115 of the Civil Procedure Code, Act V of 1908), urging that the suit was allowed to be withdrawn on insufficient grounds, that the procedure followed was irregular, and that without notice to the defendant the suit should not have been allowed to be withdrawn with permission to bring a fresh suit. A *rule nisi* was issued which called on the plaintiff to show cause why the order passed by the District Judge should not be set aside.

*K. H. Kelkar* for the applicant (defendant) in support of the rule.

*N. V. Gokhale* for the opponent (plaintiff) to show cause.

*SCOTT, C. J.*:—The plaintiff brought a suit against the defendant for possession of certain lands alleging that they belonged to him and had been handed over to the defendant on his undertaking to pay Rs. 50, per annum, to the plaintiff for maintenance and that the defendant had failed to do so.

The defendant contended that the plaintiff had relinquished his rights in the lands in favour of the defendant. Upon this defence the Subordinate Judge rejected the claim with costs.

The plaintiff preferred an appeal to the District Court, but before the appeal was admitted he made an application under

Order XXIII for leave to withdraw the suit and bring a fresh suit. This application was heard and granted by the District Judge without any notice to the defendant. It is contended that the learned District Judge has acted with material irregularity in the exercise of his jurisdiction in two particulars. In the first place, his duty upon the presentation of an appeal is laid down by Order XLI, Rule 11, from which it appears that he may dismiss the appeal without sending notice to the respondent or he may adjourn the hearing, and, if the appellant does not appear, he may dismiss the appeal. But there is no provision allowing him to entertain an application the effect of which will be to get rid of the decree of the lower Court without any notice to the decree-holder and without any hearing of the appeal. It is also contended that the course taken by the learned District Judge is not sanctioned by the provisions of Order XXIII. The Court is empowered to make an order permitting withdrawals from a suit or abandonment of part of a claim where it is satisfied that the suit must fail. That implies that the suit has not yet been disposed of. But in the present case the suit has been disposed of and the decree has been passed in favour of the defendant.

It is clearly, we think, beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant has obtained a decree in his favour.

We, therefore, set aside the order of the District Judge under Order XXIII and direct him to admit or reject the appeal under the provisions of Order XLI, Rule 11.

Rule made absolute with costs.

*Rule made absolute.*

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