

APPELLATE CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Heaton.

1919.

November
28.

CHHANUBHAI MANSUKH RAMI (ORIGINAL DEFENDANT), APPELLANT
v. DAHYABHAI GOVIND (ORIGINAL PLAINTIFF), RESPONDENT^o.

Civil Procedure Code (Act V of 1908), Order XXIII, Rule 1—Withdrawal of a suit in appellate Court—Power of the Court to allow permission to withdraw with liberty to file a fresh suit—Jurisdiction.

An appellate Court can, when an appeal has been admitted, and when both parties are represented before it, allow the plaintiff to withdraw his case on proper terms and allow him to start afresh.

Elkath v. Ranaji⁽¹⁾, distinguished.

SECOND appeal against the decision of V. V. Kalyanpurkar, Small Cause Court Judge, A. P., of Ahmedabad, reversing the decree passed by M. J. Kadri, Extra Joint Subordinate Judge at Ahmedabad.

Suit to recover money.

The plaintiff brought a suit (No. 629 of 1913) on a khata, dated the 23rd February 1912, in the First Class Subordinate Judge's Court at Ahmedabad. The Court held that the form of the suit was defective and dismissed the suit.

The plaintiff appealed to the District Court. The appeal was admitted and notice issued to the respondent. At the hearing of the appeal when the respondent was duly represented by his pleader, the appellate Court allowed the plaintiff permission to withdraw the suit with liberty to bring a fresh suit after recording reasons for the same.

The plaintiff then instituted a fresh Suit No. 152 of 1915 on the khata for the recovery of Rs. 619

^o Appeal from Order No. 40 of 1918.

⁽¹⁾ (1911) 35 Bom. 261.

The defendant contended *inter alia* that the suit was barred by *res judicata* by reason of the decision in Suit No. 629 of 1913, and that it was barred by Order II, Rule 2, Civil Procedure Code, 1908.

The Subordinate Judge held that the order granting permission to the plaintiff to withdraw Suit No. 629 of 1913 was illegal and not binding on the defendant; that the appellate Court could not grant such permission: *Eknath v. Ranaji*^(a). He, therefore, dismissed the suit as being barred by *res judicata*.

On appeal the First Class Subordinate Judge, A. P., reversed the decree holding that the permission given by the appellate Court to withdraw the suit was legal and valid and that the point of *res judicata* did not arise. His reasons were as follows:—

“In the case of 35 Bombay the permission was given before the appeal was admitted. The appellate Court had not been possessed of jurisdiction. There was no notice to the respondent of the appeal or of the Court's order to permit the withdrawal. The effect of the Court's order was to nullify the decree obtained by the respondent without his knowledge. There is no doubt that the language of the judgment in that case is wide enough to cover this case. But as explained by Krishnan J. at page 266 of I. L. R. 40 Mad. 259, that language is to be read with reference to the facts of the case. And so far as the facts go that case is distinguishable. For in the present case the appeal had been admitted and it was on the day of hearing of the appeal when the respondent was duly represented by his pleader that the appellate Court allowed the withdrawal recording reasons for so doing. The point in the present case is not one as to the soundness of the reasons. The point before this Court now is as to the power of the appellate Court.

As to the case of 27 Mad. L. J. it is distinctly overruled by a Full Bench of the same Tribunal; I. L. R. 40 Mad. 259. Further the Allahabad High Court had held that an appellate Court can give permission to withdraw a suit and give leave to institute a fresh one; I. L. R. 37 All. 326.”

The defendant appealed to the High Court.

G. N. Thakor, for the appellant;—I submit that the withdrawal of the suit was without jurisdiction.

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The preliminary condition of withdrawal under Order XXIII, Rule 1 was that the suit was not yet disposed of. After the suit is once disposed of, the appellate Court has no jurisdiction to withdraw the suit: *Elknath v. Ranaji*⁽¹⁾.

[MACLEOD, C. J.:—In *Elknath v. Ranaji*⁽¹⁾ the suit was allowed to be withdrawn before the admission of the appeal. Here the appeal was admitted and proceedings opened.]

It is no essential part of the reasoning in *Elknath's case*⁽¹⁾ that the appeal had not been admitted. The fact that the appeal was admitted would not make any difference. The proceedings in suit terminated with the passing of the decree and so long as the decree is standing, the appellate Court will have no jurisdiction to allow *the suit* to be withdrawn. Its powers will be confined to allowing the *appeal* to be withdrawn.

The case of *Kamayya v. Papayya*⁽²⁾ relied on by the lower Court is distinguishable on the ground that the decree there was reversed by the appellate Court after the admission of the appeal and then permission to withdraw was given; in the present case, however, the decree of the Subordinate Judge's Court was not disturbed by the District Judge when allowing permission to withdraw.

J. G. Rele, for the respondent was not called upon.

MACLEOD, C. J.:—This appeal deals with the question whether an appellate Court can allow a plaintiff appealing against an order dismissing his suit to withdraw his suit with liberty to bring a fresh suit. In this case the plaintiff had brought a previous suit which was dismissed. On appeal when the respondent was duly represented by his pleader the appellate Court

(1) (1911) 35 Bom. 261.

(2) (1916) 40 Mad. 259.

allowed a withdrawal and recorded its reasons for so doing. Now when the plaintiff has brought this suit, he is met with the plea of *res judicata*. The plea is based on the argument that the appellate Court had no jurisdiction to allow the plaintiff to withdraw the previous suit with liberty to bring a fresh suit. The appellant has relied upon a decision of this Court in *Eknath v. Ranoji*^(a). There the facts were that the appeal had not been admitted, and before the admission the Court in effect set aside the decree dismissing the suit and allowed the plaintiff to withdraw his suit. Clearly the appellate Court had no jurisdiction to deal with the order of the lower Court because the appeal had not been admitted. Once the appeal is admitted, then the whole of the case is re-opened. The suit is still proceeding, and the Court has jurisdiction to allow a party to withdraw his case at any time during the continuance of the proceedings, provided of course it proceeds in the proper way and hears both parties. It cannot be said that an appellate Court has no jurisdiction to deal with the case in whatever way it pleases. Its decision may be wrong, but that is not a question of jurisdiction. I cannot see myself why an appellate Court cannot, when an appeal has been admitted, and when both parties are represented before it, allow the plaintiff to withdraw his case, on proper terms, and allow him to start afresh. The appeal is dismissed with costs.

HEATON, J.:—I concur.

Decree confirmed.

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