Reserved on: 09.10.2025
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HIGH COURT OF JUDICATURE AT ALLAHABAD

MATTERS UNDER ARTICLE 227 No. - 4747 of 2019

Jeera Devi and another

…..Petitioner(s)

Versus

Additional District Judge Court No.12, Varanasi and 2 others

…..Respondent(s)

Counsel for Petitioner(s)	:	Brij Raj
Counsel for Respondent(s)	:	Pratik J. Nagar, Shambhu Nath, Triveni Shanker

Court No. - 3

HON'BLE SAUMITRA DAYAL SINGH, J.
HON'BLE RAJEEV MISRA, J.
HON'BLE AJAY BHANOT, J.

1. The present reference to a larger bench has arisen on a reference made by a learned single judge, on two questions of law framed by his lordship:

> *"(i) Whether the decision of this Court in **Raisa Sultana Begam, AIR 1996 Allahabad 318** holding that an application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 once moved, leads to a withdrawal of the suit ipso facto without the Court passing an affirmative order, is still good law, in view of*

the subsequent decision of the Full Bench in ***The Sunni Central Board v. Sri Gopal Singh Visharad, 2010 ADJ 1 (SFB)(LB)*** *and the Supreme Court in* ***M. Siddiq (dead) through legal representatives (Ram Janmabhoomi Temple case) v. Mahant Suresh Das and others, (2020) 1 SCC 1 and Anurag Mittal v. Shaily Mishra Mittal, (2018) 9 SCC 691*** *?*

(ii) Whether the decision in ***Meera Rai v. Additional Sessions Judge and others, 2017 (12) ADJ 817*** *does not lay down the law correctly, in view of the law laid down by the Supreme Court in* ***Anurag Mittal v. Shaily Mishra Mittal, (2018) 9 SCC 691*** *on the issue if the mere lodging of an application to unconditionally withdraw a suit under Order XXII Rule 1 of the Code of Civil Procedure, 1908 operates as a withdrawal of the suit ipso facto and without an affirmative order?"*

2. The facts giving rise to the present reference have been summarised by the learned single judge in the reference order, as below:

"2. The facts giving rise to this petition, in necessary detail, are these :

Plot No. 40 admeasuring 0.243 hectare and Plot No. 156 admeasuring 0.72 decimal, situate in Village Mauza Saraimugal, Pargana Athagaon, Tehsil Pindra, District Varanasi was recorded in the name of one Smt. Munnan Devi. She was a co-sharer in the two plots to the extent of a half share along with her co-tenure holder, Smt. Ramdei Devi, wife of Ramdas. One Smt. Amrawati Devi, wife of Late Panna Lal, claimed that Smt. Munnan Devi had executed a sale deed of her half share in the plots of land above mentioned on 09.10.1998. Smt. Amrawati Devi got her name recorded as a co-tenure holder along with Smt. Ramdei Devi, after mutating out the name of Smt. Munnan Devi in the revenue records on 11.08.1999. This was done on the basis of the sale deed dated 09.10.1998. On 08.02.1999, Smt. Munnan Devi brought a prompt action against Smt. Amrawati Devi, seeking a declaration that the sale deed dated 09.10.1998 was null and void, with a prayer that the declaration granted be communicated to the Sub-Registrar, where the deed had been registered for recording the declaration. A permanent injunction was also claimed against Smt. Amrawati Devi to the effect that the defendant be restrained from interfering with the plaintiff's title and possession in the suit property or otherwise creating an obstruction in any manner, and further not to destroy the standing

crops in the suit property. The aforesaid suit brought by Smt. Munnan Devi against Smt. Amrawati Devi was numbered on the file of the Civil Judge (Junior Division) Haveli, Varanasi as Original Suit No. 154 of 1999. The short case of Smt. Munnan Devi in the suit was that the impugned conveyance dated 09.10.1998 was not her deed. It had been got executed by Smt. Amrawati Devi through the agency of an imposter, a woman, different from Smt. Munnan Devi. The sale deed was, therefore, impugned as a void document.

3. On 03.07.2000, a written statement was filed by Smt. Amrawati Devi, contesting the plaintiff's case. It would not be material, for the purpose of this petition, to enumerate what her defence was. Smt. Munnan Devi put in a replication on 29.08.2000. On 30.08.2000, the Trial Court struck issues, a total of seven. What the issues were is also not relevant for the purpose of this petition. The sole plaintiff, Smt. Munnan Devi, was examined as P.W.1. She testified in the dock on 11.02.2003 and 17.07.2003. Pending suit, Smt. Munnan Devi executed two sale deeds - one in favour of Smt. Jeera Devi, conveying her half share in Plot No. 156, that is to say, the area of 0.298 hectare out of the total of 0.596 hectare; and the other in favour of Ghanshyam Patel, conveying her half share in Plot No. 40 admeasuring 0.121 hectare out of the total of 0.243 hectare. Both these sale deeds were executed on 21.05.2011 and admitted to registration by the Sub-Registrar, Pindra, Varanasi on 23.05.2011. On the 9th of February, 2013, Smt. Munnan Devi passed away, while the suit was still pending.

4. On 15.04.2013, Smt. Phulpatti Devi, daughter of Smt. Munnan Devi, applied to be substituted in place of the sole plaintiff. The substitution application was granted by the Trial Court on 05.07.2013. Smt. Phulpatti Devi, the substituted plaintiff, seems to have prosecuted the suit for a period of approximately five years until 05.04.2018, when she made an application under Order XXIII Rule 1 of the Code of Civil Procedure, 1908 seeking to unconditionally withdraw the suit. The aforesaid application is numbered on the record of the Trial Court as Paper No. 45 ग—.

5. Close on heels of the sudden termination of action by Smt. Phulpatti Devi, Smt. Jeera Devi filed an application bearing Paper No. 48 क under Order XXII Rule 10 of the Code, seeking leave of the Court to continue the suit.

6. On 22.08.2018, Smt. Jeera Devi filed objections to the application dated 05.04.2018 made by Smt. Phulpatti Devi, seeking to withdraw the suit. On the 4th of July, 2018,

Ghanshyam Patel made an application 54 क under Order XXII Rule 10 of the Code, seeking leave of the Court to continue the suit. On 13.07.2018, Smt. Jeera Devi and Ghanshyam Patel made an application, seeking recall of the order granting substitution in favour of Smt. Phulpatti Devi, but no orders were passed on the said application by the Trial Court. The Trial Court, by its order dated 04.09.2018, allowed the applications 48 क and 54 क made by Smt. Jeera Devi and Ghanshyam Patel, respectively, seeking leave to continue the suit and rejected the application 45 ग— made by Smt. Phulpatti, praying for withdrawal of the suit.

7. Smt. Phulpatti Devi preferred Misc. Civil Appeal No. 143 of 2018 to the District Judge of Varanasi under Order XLIII Rule 1(l) of the Code, seeking reversal of the order dated 04.09.2018 passed by the Additional Civil Judge (Junior Division) Court No. 7, Varanasi. The appeal, upon assignment, came up for determination before the Additional District Judge, Court No. 12, Varanasi on 04.05.2019, who proceeded to allow the appeal, set aside the order dated 04.09.2018, rejected the two applications seeking leave to continue the suit and accepted Smt. Phulpatti Devi's application to withdraw.

8. Aggrieved by the order dated 04.05.2019, Smt. Jeera Devi and Ghanshyam Patel have instituted this petition under Article 227 of the Constitution."

3. Heard Sri Atul Dayal, learned Senior Advocate assisted by Sri Brij Raj, learned counsel for original petitioners, Sri Triveni Shankar alongwith Sri Ajay Shankar, learned counsel appearing for respondent No. 4, Sri J. Nagar, learned Senior Advocate assisted by Sri Shambhu Nath, learned counsel for original respondent No. 3 and Sri Saurabh Pandey, Advocate, who has been heard upon intervention granted by the Court.

4. Sri Atul Dayal would submit, that the issue has been squarely answered by a two-judge bench decision of the Supreme Court, in **Rajendra Prasad Gupta Vs. Prakash Chandra Mishra & Ors.; AIR 2011 SC 1137**. Therein, it was observed "there is no express bar

in filing an application for withdrawal of the withdrawal application", in a suit proceeding.

5. According to him **Anurag Mittal Vs. Shaily Mishra Mittal; (2018) 9 SCC 691** is wholly distinguishable. That decision had arisen under the provisions of the Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA') read with Family Courts Act,1984 to which Order XXII Rule 10 has no application. Even otherwise, on facts, the said case is distinguishable.

6. Referring to Order XXII Rule 6 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'Code') read with Section 146 of the Code, he contends that the rights of an assignee to continue the suit proceeding cannot be eclipsed or foreclosed by the assignor. **Smt. Raisa Sultana Begam & Ors. Vs. Abdul Qadir & Ors.; AIR 1966 All 318** is described to have lost it's efficacy on being specifically overruled by a Special Full Bench in **Sunni Central Board of Waqfs Vs. Sri Gopal Singh Visharad & Ors.; 2010 ADJ 1 (SFB) (LB)**. Though that decision of the Special Full Bench itself was reversed by the Supreme Court, the reasoning given by the Special Full Bench to overrule **Smt. Raisa Sultana Begam (supra)**, remains.

7. Also, he would submit, "automatic order" is inconsistent to inherent character of judicial functions of Court - to grant or withhold a remedy. He has relied on **Gamlen Chemical Co. (UK) Ltd. Vs. Rochem Ltd. & Ors.; (1980) 1 WLR 614**.

8. He has also drawn our attention to **Sunder Vs. Mohd. Ismail; 2004 (3) ALD 318**, a decision of Andhra Pradesh High Court to submit, a plain reading of Order XXIII Rule 3 does not suggest that such application is required to be "ordered automatically".

9. Responding to the above, Sri Triveni Shankar along with Sri Ajay Shankar, learned counsel for the respondents would submit that the Supreme Court decision in **Rajendra Prasad Gupta (supra)** does not refer to the provisions of Order XXII and Order XXIII of the Code. The said decision of the Supreme Court is with reference to powers of the Civil Courts under Section 151 of the Code and not with reference to Order XXII rule 6 of the Code

10. In contrast, in **Anurag Mittal (supra)**, full consideration has been made of the statutory and the presidential law. Thereafter, considering **K. S. Bhoopathy Vs. Kokila; (2000) 5 SCC 458**, it was observed that a suit would stand withdrawn on the date of the withdrawal application being filed as the trial court "has to grant it", without exception.

11. Relying on earlier, Full Bench (three judge bench) decision of this Court in **Gopal Krishna Indley Vs. 5th Additional District Judge, Kanpur & Ors.; AIR 1981 All 300**, it has been urged, that the later decision of the Supreme Court in **Anurag Mittal (supra)** lays down the law more elaborately. Hence it is good law. Also, relying on yet another Full Bench (three judge bench) decision of this Court in **Ganga Saran Vs. Civil Judge, Hapur, Ghaziabad & Ors.; AIR 1991 All 114**, it has been urged, the later decision of the Supreme Court is binding.

12. Sri J. Nagar learned Senior Advocate would submit that an act of withdrawal is an act of retirement from contest. It requires no further act of the Court to complete that action or its consequence.

13. While such submissions have been advanced, we are required to answer the question as referred for our consideration by the learned single judge. In that, an element of uncertainty/conflict of law has

been noticed between **Smt. Raisa Sultana (supra)** as dealt with by the Special Full Bench in **Sunni Central Board of Waqfs (supra)**, reversed in **M. Siddiq (dead) through legal representative (Ram Janmabhoomi Temple case) Vs. Mahant Suresh Das & Ors.; (2020) 1 SCC 1** and the decision of the Supreme Court in **Anurag Mittal (supra)**.

14. Second, the learned single judge has observed uncertainty of law declared in **Meera Rai (supra),** in view of **Anurag Mittal (supra)**.

15. Taking the first doubt expressed to **Smt. Raisa Sultana Begam (supra)**, the precise question referred to a larger bench (of two judges) in that case, was noted as below:

> *"Can the plaintiff who has already moved an application under Sub-rule (1) of Order XXIII, Rule 1, C.P.C. withdraw the application for the withdrawal of the suit before orders are passed on the withdrawal application, i.e., the suit is, as far as the plaintiff is concerned, struck off from the file ?"*

16. There, the plaintiff – Gufran, filed an application in a pending suit proceeding, to withdraw the same. While that application remained pending, he filed another application to withdraw his withdrawal application (filed earlier), alleging fraud. Yet, the trial court allowed his first/withdrawal application. In revision, the above noted issue was referred to a larger bench.

17. The conflict of opinion between different single judge bench decisions, was resolved in **Raisa Sultana Begum (supra)**, by a division bench, on the reasoning that there existed no provision to confer a right to revoke withdrawal from a suit and that the right to withdraw from a suit did not include a right to revoke that withdrawal. Further, the act of withdrawal is complete or effective at once i.e. on information being conveyed to the court, and no formal

order is required to effectuate or recognize it. Accordingly, the question referred to that division bench was answered in the negative.

18. Thus, the earlier view taken in **Ram Bharos Lall vs. Gopee Beebee (1874) 6 NWP 66** was observed to be not a good law - to the extent it held:

> *"It is difficult to understand why a plaintiff should have liberty to withdraw from a suit and not have equal liberty to rescind the act of withdrawal at any time before final judgment."*

19. Later, the Special Full Bench in **Sunni Central Board of Waqfs (supra)** overruled that dictum of **Smt. Raisa Sultana Begam (supra)**. It was observed:

> *"1035. Once a suit is duly instituted, the Court would pass order issuing summons to the defendants to appear and answer the plaint. Such summons, vide Order V Rule 3, are required to be signed by the Judge or such officer as he appointed, and also the seal of the Court. A suit once duly instituted and registered in the Court would not struck off from the record of the Court on the mere communication by the plaintiff orally or in writing that he intends to withdraw unless an order is passed by the Court to the said effect, which would have the legal consequence of bringing the proceedings set in motion by instituting the suit, to a halt. Mere absence of any provision permitting withdrawal of the application filed by a plaintiff for withdrawing the suit does not mean that no such power is vested in the plaintiff. So long as an order is not passed by the Court, if the plaintiff informs the Court by moving an application that he intends to withdraw the application for withdrawal of suit, he can always request or inform the Court that he does not want to press the application and the same may be dismissed as not pressed or withdrawn. It is only where the plaintiff press his application before the Court requiring it to pass the order for withdrawal of the Suit, the Court would pass the said order in accordance with law since it cannot compel a plaintiff to pursue a suit though he want to withdraw the same. It would thus be wholly unjust to hold that once an application to withdraw the suit is filed by a plaintiff, he cannot withdraw the same and the suit would stand dismissed as withdrawn. This would have serious and drastic consequences in as much as he cannot file a fresh suit on the same cause of action.*

1036. Moreover, the existence of a provision i.e. Rule 1(3), empowering the Court to consider as to whether the plaintiff should be saddled with the liability of payment of cost or not also contemplates that an application for withdrawal of suit by itself would not result in any consequences whatsoever unless the Court has applied its mind regarding the cost. If what has been held in ***Smt. Raisa Sultana Begam (supra)*** *is taken to be correct, it would mean that there would be no occasion for the Court to apply its mind on the question of cost under Rule 1(3) since the suit would stand dismissed as withdrawn as soon as the plaintiff informs the Court about his decision for withdrawal of the suit either orally or in writing. This is nothing but making Rule 3 (1) redundant. The earlier judgement of this Court in* ***Raja Shumsher Bahadoor Vs. Mirja Mahomed Ali (1867) Agra H.C.R. 158*** *wherein this view was taken that the withdrawal must be regarded as terminating automatically the proceedings in the suit involving the suit's immediate dismissal was not found to be correct subsequently by the Division Bench in* ***Ram Bharos Lall****. We, therefore, find it appropriate in the entire facts and circumstances to take a different view and have no hesitation in holding though with great respect to the Bench, that the law laid down in* ***Smt. Raisa Sultana Begam (supra)*** *is not correct. In our view, the law laid down in* ***Ram Bharos Lall (supra)****,* ***Mukkammal Vs. Kalimuthu Pillay (supra), Raj Kumari Devi Vs. Nirtya Kali Debi (supra)*** *and* ***Yeshwant Govardhan Vs. Totaram (supra)*** *lay down the correct law. We also find that a Division Bench of Orissa High Court in* ***Prema Chanda Barik Vs. Prafulla Kumar Mohanty AIR 1988 Orissa 33*** *has also taken the same view and did not find itself agreeable with the Division Bench decision in* ***Smt. Raisa Sultana Begam (supra)****. In fact, a Division Bench of Calcutta High Court in* ***Rameswar Sarkar Vs. State of West Bengal and others AIR 1986 Cal. 19*** *has gone slightly further by observing that where there is no provision under the Code providing for withdrawal of application for withdrawal of suit, Section 151 C.P.C. would apply."*

(emphasis supplied)

20. However, it is equally true that the said decision of the Special Full Bench has itself been reversed by the Supreme Court in **M. Siddiq (supra)**.

21. Therefore, if there existed no other binding precedent, it may have been said that **Smt. Raisa Sultana Begam (supra)**, is good law. To the extent, **Meera Rai (supra)** is a decision of the bench presided by

a learned single judge, it may not prevail over **Smt. Raisa Sultana Begam (supra)**, a decision rendered by a division bench.

22. Yet, to complete our discussion, it may further be noted, that there exists yet another earlier division bench decision of this Court in **Kanhaya Lal and Others vs. Partab Chand (1931) 29 ALJ 232** authored by Sulaiman, J, one of the most distinguished jurists produced by this Court. In that case, an application was filed under Order XXIII Rule 1 of the Code, to withdraw the appeal filed by the defendants in the suit. It was opposed by the respondents. They filed an application against grant of permission to withdraw. However, they had not filed any cross-objection to the appeal. It was opined that the appellant did not have an absolute right to withdraw the suit, to nullify the decree (in that case). Yet, on the interpretation of Order XXIII Rule 1 sub-rule (1) and sub-rule (2), the learned jurist opined as below:

> *"Reading these two provisions of law together it seems to us that an appellant has the right to withdraw his appeal unconditionally, his only liability being to pay costs."*

23. The said bench also noted with approval the ratio of a still earlier decision of the Court in **Kalyan Singh vs. Rahmu, I.L.R. (1901) 23 All. 130** wherein it was held that appellant had absolute right to withdraw his appeal, at any time before judgment, and in substance, application filed to that effect is not an application for permission to withdraw the appeal but an intimation of withdrawal. Thereafter that appeal was declared withdrawn, however with costs awarded to the respondents.

24. Coming to **Rajendra Prasad Gupta (supra)**, it is a decision of the Supreme Court. We may first note, that matter travelled to the Supreme Court from this Court, in **Prakash Chandra Mishra and**

Others vs. Rajendra Prasad Gupta and Others, 2004 (55) ALR 282. There, the plaintiffs Rajendra Prasad Gupta and Others had instituted an injunction suit. In that an application for temporary injunction was also filed. It was granted. Thereafter, on 12.12.1997, the plaintiffs moved an application to withdraw the suit before any of the defendants had entered appearance. The Court fixed the date 07.01.1998, on that application, it being the date fixed (earlier) for appearance of the defendants. Before any further order could be passed, the plaintiffs filed a further application to withdraw the earlier application filed by them - to withdraw the suit proceeding. It was rejected. The trial court opined that the withdrawal application was filed under Order XXIII Rule 1 of the Code. Therefore, no specific order was required to be passed on that application to cause the effect of withdrawal of the suit. It relied on the division bench decision of this Court in **Smt. Raisa Sultana Begam (supra)**. In appeal, the said order was set aside by the first appeal court, and the matter was remitted to the trial court for disposal of the dispute on merit. In a First Appeal From Order filed before this Court, the learned single judge allowed the defendants' appeal following **Smt. Raisa Sultana Begam (supra)**. For ready reference, the facts noted in **Prakash Chandra Mishra (supra)** by the learned single judge are as below:

> *"2. The trial court was of the opinion that the application for withdrawal of the suit was under Order XXIII, Rule 1 of the Code of Civil Procedure. No specific order for withdrawal of the suit was required. Therefore, for all practical purposes the suit stands withdrawn. In that view of the matter the application to withdraw the application for withdrawal of the suit is not maintainable. Reliance was placed upon a Division Bench judgment of this Court. By order dated 18.9.1998 application No. 14-Ka was rejected and the suit was treated to have been dismissed. This order has been set aside by the Court below in Civil Appeal No. 262 of 1998 by its judgment and order dated 5.5.2003. The matter has been remanded to the Court below for disposal of the dispute*

on merit. Aggrieved by this order the defendants have come up before this Court in present appeal."

25. Thus, the defendants First Appeal From Order was allowed with the following observation:

"7. In view of the above ruling it is clear that the present one is the case of abandonment of the suit and it was complete as soon as application was filed. There is no allegation of any fraud or collusion etc. In this view of the matter order of the Court below cannot be sustained. Thus, the first point raised by the respondent has no merit."

26. That matter was carried to the Supreme Court by the plaintiff's side in **Rajendra Prasad Gupta (supra)**. Therein it was observed as below:

"3. The High Court was of the view that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without any order on the withdrawal application. Hence, the second application was not maintainable.

4. We do not agree. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted. There is no express bar in filing an application for withdrawal of the withdrawal application."

27. Thus, it would be erroneous to assume that in **Rajendra Prasad Gupta (supra)** the application to withdraw the suit had been filed under Section151 of the Code. On the contrary, from the perusal of the order of this Court [i.e. in **Prakash Chandra Mishra (supra)**] the contrary is true. The application to withdraw the suit proceeding was filed under Order XXIII Rule 1 of the Code, and not Section 151 of the Code. In fact, the further application to withdraw the application to withdraw the suit is referable to section 151 of the Code.

28. Therefore, brief as it may be, by virtue of Article 141 of the Constitution of India, the declaration of the law made by the Supreme Court in **Rajendra Prasad Gupta (supra)** cannot be avoided by this Court. To that extent, this Court may remain bound to apply that law declared by the Supreme Court and it may not attempt to interpret the same. In **Fuzlunbi vs. K. Khader Vali (1980) 4 SCC 125**, the Supreme Court through the eloquence of Justice V.R. Krishna Iyer observed as below:

> *"**7.** We need not labour the point because this Court has already interpreted Section 127(3)(b) in Bai Tahira [(1979) 2 SCC 316 : 1979 SCC (Cri) 473] and no Judge in India, except a larger Bench of the Supreme Court without a departure from judicial discipline can whittle down, wish away or be unbound by the ratio thereof. The language used is unmistakable, the logic at play is irresistible, the conclusion reached is inescapable, the application of the law as expounded there is an easy task. And yet, the Division Bench, if we may with respect say so, has, by the fine art of skirting the real reasoning laid down "unlaw" in the face of the law in Bai Tahira [(1979) 2 SCC 316 : 1979 SCC (Cri) 473] which is hardly a service and surely a mischief, unintended by the Court maybe, but embarrassing to the subordinate judiciary."*

29. Thus, it appears that the ratio in **Raisa Sultana Begam (supra)** lost its binding force in view of the contrary ratio emerging from **Rajendra Prasad Gupta (supra),** by own force of Article 141 of the Constitution of India. Hence, we must consider the other aspect of the reference made by the learned single judge contained in the later part of question number (i) and question number (ii), as referred, i.e. whether the later decision of the Supreme Court in **Anurag Mittal (supra)** runs contrary to the reasoning of the Supreme Court in **Rajendra Prasad Gupta (supra)**. Only if it is so, the next question may arise whether ratio of **Anurag Mittal (supra)** overrides **Rajendra Prasad Gupta (supra),** on the strength of the further

reasoning that a more reasoned and later decision of the Supreme Court may be binding.

30. In **Anurag Mittal (supra)**, the marriage between Anurag Mittal and his first wife was dissolved at the instance of the first wife-spouse of Anurag Mittal, by the judgement and decree of the trial court dated 31.08.2009. Simultaneously, another suit for restitution of conjugal rights brought by the husband-spouse Anurag Mittal, against his first wife, was dismissed. Upon appeals filed by the husband-spouse thereagainst, the High Court stayed the decree of divorce vide order dated 20.11.2009. Pending such appeals, those parties reached a settlement on 15.10.2011. Thereunder, the husband spouse Anurag Mittal undertook to withdraw his appeals (pending before the High Court), within 30 days. He filed such application. On 28.11.2011, his statement was recorded before the Registrar of the High Court - confirming the settlement reached between the parties. Consequently, the appeals were dismissed as withdrawn in terms of that settlement, vide order dated 20.12.2011.

31. Meanwhile, the husband-spouse i.e. Anurag Mittal remarried on 06.12.201. Unfortunately, his second marriage also suffered matrimonial discord. In that circumstance, his second wife i.e. Shaily Mishra Mittal sought a declaration that her marriage was void under Section 5(1) read with Section 11 of the HMA. According to her, on the date of her marriage 06.12.2011, Anurag Mittal was married to his first wife. The suit filed by Shaily Mishra Mittal was dismissed by the Family Court. That order was set aside by the High Court.

32. In such facts an issue arose before the Supreme Court, whether the dismissal of appeal filed by the husband-spouse “relates back” to the date of filing of the application for withdrawal. The Supreme Court

noticed the provisions of Order XXIII Rule 1 of the Code as also its earlier decision in **Kokila (supra)** and thereafter observed as below:

> *"16. The question for consideration in the present case is whether the High Court has exercised the discretion vested under Order XXIII Rule 1(3) CPC on consideration of matters relevant for exercise of such power. On perusal of the impugned order it is clear to us that the learned Judge has not considered the matter in its proper perspective while allowing the prayer of the plaintiff for permission to withdraw the suit with leave to file a fresh suit. The order is vitiated on account of non-application of mind to the relevant aspects of the matter. This position is clear from some observations in the impugned order which are extracted hereinbelow:*
>
> > *"But, one fact-situation has to be remembered in this case, viz., that it was the appellants who succeeded in the trial court in obtaining a decree and in the appeal against such decree by the respondents, which was partly allowed, the appellate court found that the pathway was common to both the parties, but the right was not gone into, title was not determined, in such a situation withdrawal of the suit at the appellate stage although it may amount to withdrawal or nullification of the appellate court's order, still did not hurt any party other than the withdrawing plaintiffs, because they are also having the right to use the common pathway and the decree preventing installation of the machinery is nullified. Therefore, the contention that withdrawal will prejudice the respondents, has no basis. The apprehended prejudice can be safeguarded by keeping the right to use the pathway by both the parties till the disposal of the suit.*
> >
> > *... In view of this settled position, it is appropriate to permit withdrawal of the suit with a liberty to file a fresh suit for declaration of title which they ought to have done at the initial stage. By withdrawal, the respondents should not be deprived of the benefit of usage of that passage till the final adjudication. If there are valid defences, they can raise all such defences."*
>
> *17. From the above it appears that the approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive user of the pathway was necessary they should have framed the suit*

accordingly. On the other hand the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of user of the property. From the facts and circumstances of the case as emanating from the judgments of the trial court and the first appellate court it is clear that the plaintiffs realised the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate court they took recourse to Order XXIII Rule 1(3) CPC and filed the application for withdrawal of the suit with leave to file a fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for user of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. It is the duty of the court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied with by merely stating that grant of permission will not prejudice the defendants. In case such permission is granted at the appellate or second appellate stage prejudice to the defendant is writ large as he loses the benefit of the decision in his favour in the lower court.

18. Order 23 Rule 1(1) CPC enables the plaintiff to abandon his suit or abandon a part of his claim against all or any of the defendants. Order 23 Rule 1(3) CPC requires the satisfaction of the Court for withdrawal of the suit by the plaintiff in case he is seeking liberty to institute a fresh suit. While observing that the word abandonment in Order 23 Rule 1(1) CPC is "absolute withdrawal" which is different from the withdrawal after taking permission of the court, this Court held as follows [K.S. Bhoopathy v. Kokila, (2000) 5 SCC 458] : (Kokila case [K.S. Bhoopathy v. Kokila, (2000) 5 SCC 458] , SCC pp. 463-64, para 12)

> *"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 2 Rule 2 and Section 11 CPC."

19. Order 23 Rule 1(1) CPC gives an absolute right to the plaintiff to withdraw his suit or abandon any part of his claim. There is no doubt that Order 23 Rule 1 CPC is applicable to appeals as well and the appellant has the right to withdraw his appeal unconditionally and if he makes such an application to the Court, it has to grant it. [Bijayananda Patnaik v. Satrughna Sahu, (1964) 2 SCR 538 at p. 550 : AIR 1963 SC 1566, p. 1571, para 7] Therefore, the appeal is deemed to have been withdrawn on 28-11-2011 i.e. the date of the filing of the application for withdrawal. On 6-12-2011 which is the date of the marriage between the appellant and the respondent, Ms Rachna Aggarwal cannot be considered as a living spouse. Hence, Section 5(i) is not attracted and the marriage between the appellant and the respondent cannot be declared as void."

33. The Supreme Court considered the effect in law caused by the mandatory provisions of Section 15 of the HMA - to the extent it provides a statutory injunction against another marriage being solemnized by the party seeking divorce, during the pendency of a regular appeal against that decree of divorce. The purpose of that provision was read, to avert complications and to protect the matrimonial rights of the spouse contesting a decree of divorce. However, since settlement had been reached by Anurag Mittal with his first wife-spouse and therefore, he wanted to withdraw from contest against the decree of divorce pertaining to that marriage, and since he had made an application to withdraw that appeal, it was held

- he was not required to wait (to re-marry), till formal order came to be passed on his appeal. That purposive construction was offered to the provisions of Section 15 of the HMA, a social welfare and beneficial legislation - to advance its object of social reform.

34. As to law considered by the Supreme Court in **Anurag Mittal (supra)**, **Shiv Prasad vs. Durga Prasad and Others (1975) 1 SCC 405** arose from Order XXI Rule 90 of the Code. Clearly it has no bearing on the issue engaging our attention. Then, **Anil Dinmani Shankar Joshi and another vs. Chief Officer, Panvel Municipal Council, Panvel and another, 2003 SCC OnLine Bom 24** is a decision of the Bombay High Court. It recognized the 'right' of a plaintiff to withdraw his suit. However, that 'right' may remain independent of costs that may be imposed by the Court on such plaintiff.

35. In **Kokila (supra)**, the Supreme Court noted the difference between Order XXIII Rule 1 sub-rule (1) and sub-rule (3). It recognized the 'discretion of the Court' in exercise of that power. It thus observed as below:

> *"**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."

(emphasis supplied)

36. Then, **Bijayananda Patnaik Vs. Satrughna Sahu; 1963 SCC OnLine SC 231** was a case arising on an election petition. It did not consider the scope of Order XXIII Rule 1. In that, it also noted the earlier decisions of this court in **Kalyan Singh (supra)** and **Kanhaya Lal (supra)**. At the same time, in the facts of that case, it was recognized that in absence of any permission sought to file a suit etc., the plaintiff would have "absolute power" to withdraw his suit or a part of his claim.

37. Thus, we are unable to accept the submission as correct - that the ratio of **Anurag Mittal (supra)** is contrary to **Rajendra Prasad Gupta (supra)**. Both decisions operate in different fields of law. In

the first place, **Rajendra Prasad Gupta (supra)** is law laid down by the Supreme Court with reference to Order XXIII Rule 1 of the Code, applicable to suit proceedings whereas the ratio of **Anurag Mittal (supra)** applies to cases arising under the HMA, to which the Code does not apply, *per-se.* Precisely, it deals with an interpretation and effect of Section 15 of the HMA.

38. Second, the question involved was confined to the legal issue whether the order of withdrawal of an appeal filed under the Family Courts Act, 1984 'relates back' to the date of filing of the application. As noted above, the application to withdraw the appeal was filed by the husband spouse on the strength of a settlement reached between the parties. It was confirmed before the Registrar of the Delhi High Court. Thereafter, the husband spouse, solemnized second marriage. Later, his appeal against the decree of divorce was dismissed as withdrawn by the order of the Delhi High Court. That order was found to relate back to the date of application filed to withdraw to the extent that the settlement had been reached, and it had led the husband spouse to file an application to withdraw his appeal against the decree of divorce. Thus, the protection granted to him under section 15 of the HMA was found to have been lifted, at the own instance of the appellant.

39. Before we conclude, we may also note that interpretation of Order XXIII Rule 1 of the Code has also engaged the attention of different High Courts. A division bench of the Bombay High Court in **Yeshwant Govardhan Vs. Totaram Avasu, AIR 1958 Bombay 28,** observed as below**:**

> "8. … *and so long as the Court has not made an order showing that the withdrawal has become complete or effective, there is*

> *always a locus poenitentiae for the plaintiff to withdraw his withdrawal*."

40. In **Thomas George Vs. Skariah Joseph & Anr.; AIR 1973 Kerala 140**, the Kerala High Court disagreed with the view taken by the division bench of this Court in **Raisa Sultan Begum (supra);** and **Amalgamated Electricity Co. Ltd. Vs. Kutubuddin; AIR 1970 Mys 155**. In that, learned single judge of the Kerala High Court observed as below:

> *"4. ... It appears to me that though no order on an application for withdrawal under Order 23. Rule 1(1) is called for nevertheless withdrawal be comes irrevocable only when the Court has occasion to exercise its mind on the factum of withdrawal brought to its notice. After that moment, it is not open to the party to back out of it. Until that is brought to its notice, the withdrawal has not been acted upon. .."*

41. Then, a division bench of the Calcutta High Court in **Rameswar Sarkar Vs. State of West Bengal; AIR 1986 Calcutta 19** also had the occasion to consider the aforesaid issue. It disagreed with the division bench decision of this Court in **Raisa Sultan Begum (supra)**. Referring to Section 151 of the Code, the Calcutta High Court found that the said provision would allow for withdrawal of an application seeking to withdraw a suit. It thus observed:

> *"14. The scope of S. 151 is very wide. Where there is no provision under the Code of Civil Procedure prescribing any remedy, S. 151 will apply. O. 23, R. 1 provides withdrawal of a suit with or without liberty to file a fresh suit. There is no provision for getting an order passed on withdrawal application set aside or praying for withdrawal of an application for withdrawal of the suit. In such circumstances, in our opinion, the Court is not powerless to allow withdrawal of an application for withdrawal of a suit in exercise of its inherent power in a proper and suitable case. ..."*

42. Last, the Rajasthan High Court in **Thakur Pehp Singh Vs. Thakur Prathvi Singh & Ors.; AIR 2011 Rajasthan 22** also opined that the plaintiff would have right to withdraw his withdrawal application so long as the Court may not have made any order thereon.

43. Interestingly, it is the view taken by the Calcutta High Court that resonates in the decision of the Supreme Court in **Rajendra Prasad Gupta (supra)**, to the extent the Supreme Court has reasoned that the plaintiff would remain empowered to withdraw his application filed to withdraw a suit, till any order is passed on such withdrawal application. By virtue of section 151 of the Code, any plaintiff who may have filed an application to withdraw a suit proceeding may remain empowered to withdraw that application itself, before any order is passed on the application to withdraw the suit.

44. Thus, to the doubt expressed by the learned single judge, we respond: The decision in **Meera Rai (supra)** is good law as its reasoning is protected and preserved under the ratio of the decision of the Supreme Court in **Rajendra Prasad Gupta (supra)**. The decision of the Supreme Court in **Anurag Mittal (supra)** is wholly distinguishable, being applicable to the interpretation and determination of the scope of section 15 HMA.

45. Thus, the two decisions of the Supreme Court in **Rajendra Prasad Gupta (supra)** and **Anurag Mittal (supra**) operate in different fields. In so far as the division bench decision in **Smt. Raisa Sultana Begam (supra)** is concerned, it is no longer a good law in view of the law pronounced by the Supreme Court in **Rajendra Prasad Gupta (supra)**.

46. We also observe that the view taken in **Meera Rai (supra)** is consistent to the view taken by the Bombay, Kerala, Calcutta and Rajasthan High Courts in - **Yeshwant Govardhan (supra), Thomas George (supra), Rameswar Sarkar (supra)** and **Thakur Pehp Singh (supra)**, respectively.

47. Before we part, first, we may observe in brief - Order XXIII Rule 1 creates a ‘right’, sometimes described as ‘power’ on the plaintiff to withdraw from a suit proceeding, instituted by them. That right is absolute and one that may not require any further action on part of the Court, to fructify. Yet, that ‘right’ or ‘power’ is not in derogation, either to Section 151 of the Code which vests on the same plaintiff a right to seek withdrawal of his application to withdraw from a suit - before the Court grants its *imprimatur* and thus renders itself *functus officio*. That little window of time exists.

48. In that, to read the withdrawal of a suit proceedings as complete immediately or forthwith - upon communication of the intent (by the plaintiff), to withdraw from a suit proceeding, besides needlessly defeating Section 151 of the Code, would also militate against the other discretionary powers of the trial court - whether with respect to award of cost or to allow a party to be transposed as a plaintiff or to allow an assignee to continue the suit.

49. If allowed ‘automatically’, besides leading to multiplicity of proceedings, it would result in obstructing the fair path of justice itself. The court would become a mere postman or spectator, entirely dependent on the conduct of a plaintiff (except in cases of fraud), with no eye on or intent to address the needs of justice. That dictation of the procedural law to override the substantive law may never be consistent to the ends of justice. Therefore, it may never be desirable.

50. Accordingly:

Question number (i) is answered in the negative. We hold that the ratio laid down in **Smt**. **Raisa Sultana Begam (supra)** is no longer a good law in view of the later pronouncement of the Supreme Court in **Rajendra Prasad Gupta (supra)**.

Question number (ii) framed in the negative, is answered in the negative. We opine that **Meera Rai (supra)** is a good law being consistent to the ratio of the Supreme Court in **Rajendra Prasad Gupta (supra)**.

51. By way of clarification, we reiterate that **Anurag Mittal (supra)**, though a decision of the Supreme Court has no applicability while interpreting Order XXIII Rule 1 of the Code. That decision is relevant for an interpretation of Section 15 HMA.

52. The reference is answered accordingly. Let the record be placed before regular bench.

(Ajay Bhanot,J.) (Rajeev Misra,J.) (Saumitra Dayal Singh,J.)

January 19, 2026
Faraz/Prakhar/Abhilash