IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 1931 OF 2024

Pandurang Rajaram Inamdar ...Petitioner

Versus

Accelya Solution India Private Ltd. (formerly Kale Consultants Limited) A Public Limited Company ...Respondent

Mr. Laxman Deshmukh, for the Petitioner.
Mr. Abhijit Adgule, for the Respondent.

CORAM: N. J. JAMADAR, J.
RESERVED ON: 9th JANUARY, 2025
PRONOUNCED ON: 18th MARCH, 2025

JUDGMENT:-

1. Rule. Rule made returnable forthwith and with the consent of the learned Counsel for the parties, heard finally.

2. The petitioner – plaintiff takes exception to an order dated 24th November, 2023 passed by the learned District Judge, Kolhapur, whereby the application (Exhibit-23) preferred by the petitioner to abandon a part of the prayer in RCS/1496/2012 came to be rejected.

SANTOSH SUBHASH KULKARNI

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3. Shorn of unnecessary details, the background facts leading to this petition can be stated as under:

3.1 The respondent – defendant is a Public Limited Company. The defendant is a leading IT solutions provider to various

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industries. The petitioner was working as a Senior Vice President – Banking with the defendant company. In the month of July, 2002, the defendant had fixed annual gross salary of the plaintiff at Rs.13,50,000/- i.e. Rs.1,12,500/- per month. In the month of March, 2004 the plaintiff realized that the defendant had not deposited the salary of the plaintiff in the designated savings bank account since December, 2003. Thus, the plaintiff was constrained to institute the suit for recovery of arrears of salary, declaration and mandatory injunction.

3.2 By way of amendment, the plaintiff incorporated a prayer of declaration to the effect that the plaintiff is an employee of the defendant company and the defendant be ordered, by way of mandatory injunction, to pay the salary as mentioned in paragraph 3 of the plaint from April, 2004 onwards alongwith interest at the rate of 12% p.a.

3.3 The defendant resisted the suit. Parties led evidence. By a judgment and order dated 17th December, 2018, the learned Civil Judge was persuaded to partly decree the suit to the extent of recovery of salary for the period of 1st January, 2004 to 10th March, 2004 alongwith interest at the rate of 6% p.a. and the salary of three months at the rate of Rs.1,12,500/- per month in lieu of notice of termination alongwith interest at the rate of 6%

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p.a. However, the relief of declaration and mandatory injunction to pay the salary from April, 2004 onwards stood rejected.

3.4 The learned Civil Judge returned the findings, *inter alia,* that the plaintiff failed to prove that he is an employee of the defendant company with effect from 10th March, 2004 and, consequently, the plaintiff is not entitled to the declaration as sought and the salary, as claimed, from April, 2004 onwards.

3.5 Being aggrieved, the plaintiff preferred an appeal, being RCA/57/2019.

3.6 During the pendency of the appeal, the plaintiff preferred an application (Exhibit-23) seeking permission to abandon a part of prayer of declaration i.e., "it be declared that the plaintiff is an employee of the defendant company." The application was resisted by the defendant – respondent.

3.7 By the impugned order, the learned District Judge was persuaded to reject the application observing, *inter alia,* that by seeking to abandon the prayer of declaration, the plaintiff was attempting to nullify the findings given by the trial court in favour of the defendant and, therefore, permission to abandon a part of the claim at the stage of hearing of the appeal cannot be granted.

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4. Being aggrieved, the plaintiff has invoked the writ jurisdiction.

5. I have heard Mr. Deshmukh, the learned Counsel for the petitioner, and Mr. Adgule, the learned Counsel for the respondent, at some length. The learned Counsel for the parties took the Court through the pleadings and the judgment of the trial court.

6. Mr. Deshmukh, the learned Counsel for the petitioner, submitted that the plaintiff was seeking to simply withdraw a part of the suit claim. The withdrawal or abandonment of a part of the suit claim was also unconditional. Thus, in view of the provisions contained in Order XXIII Rule 1(1) such unconditional abandonment of a part of the claim could not have been resisted by the defendant. Mr. Deshmukh further submitted that the plaintiff is entitled to abandon a part of claim as a matter of right. The learned District Judge was, therefore, in error in declining to grant such permission to abandon a part of claim. Such abandonment will neither change the nature of the suit nor cause prejudice to the defendant. The learned District Judge, according to Mr. Deshmukh, completely misconstrued the nature of the right of the plaintiff to abandon a part of his claim.

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7. A very strong reliance was placed by Mr. Deshmukh on the judgment of the Supreme Court in the case of ***Anil Kumar Singh vs. Vijay Pal Singh and others***[1]***,*** wherein it was enunciated that when the plaintiff filed an application under Order XXIII Rule 1 and seeks permission to withdraw the suit, he is always at liberty to do so and, in such case, the defendant has no right to raise any objection to such prayer except to claim the costs.

8. Per contra, Mr. Adgule, the learned Counsel for the respondent, strongly opposed the prayer for abandonment of the prayer of declaration. Mr. Adgule would submit that the learned District Judge has applied the correct test of likely prejudice to the defendant on account of such abandonment of the prayer of declaration at the stage of appeal. Amplifying the submission, Mr. Adgule would urge, the stage of the proceedings assumes importance. At the appellate stage, the plaintiff – appellant cannot be said to have unfettered right to abandon the suit, especially after a decree is passed against the plaintiff. In that event, the element of prejudice to the defendant and likelihood of depriving the defendant of a right accrued on account of the decree passed by the trial court, would require to be evaluated.

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1 (2018) 12 Supreme Court Cases 584.

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9. Mr. Adgule submitted that in the facts of the case, the entire exercise was actuated by a design to wriggle out of the situation on account of a clear and categorical declaration by the trial court that the plaintiff failed to establish that he was an employee of the defendant, which materially bears upon the prayer of mandatory injunction to pay salary. Therefore, having realized the difficulty in seeking such a declaration of continuance of employment, the plaintiff cleverly intends to withdraw only a part of a prayer relating to declaration so that the lacuna in the plaintiff's case can be cured. Such course is legally impermissible, urged Mr. Adgule.

10. To lend support to the aforesaid submissions, Mr. Adgule placed reliance on the judgments of the Supreme Court in the cases of ***R. Rathinavel Chettiar and another vs. V. Sivaraman and others***[2] and ***Padhiyar Prahladji Chenaji (deceased) through LRs vs. Maniben Jagmalbhai (deceased) through LRs. and others***[3]***.***

11. I have given anxious consideration to the rival submissions.

12. The contours of the right of the plaintiff to withdraw or the abandon a part of suit claim under the provisions of Order XXIII

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2 (1999) 4 Supreme Court Cases 89.

3 (2022) 12 Supreme Court Cases 128.

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Rule 1(1) of the Code arise for consideration. Is the right of the plaintiff to withdraw from the suit or abandon a part of claim, unconditionally, under Order XXIII Rule 1(1) is unfettered? Does the stage of the proceedings matter? Can the plaintiff be permitted to withdraw the suit or abandon a part of claim with equal freedom, at the stage of appeal after a decree is passed by the trial court? Can the adversary object to the withdrawal of the suit or abandonment of a part of claim at the stage of appeal? If so, in what circumstances, the Court can countenance such objections. These and the like questions bear upon the determination of the remit of the power of the Court to permit withdrawal of a suit or abandonment of a part of claim at the appellate stage.

13. Order XXIII Rule 1 of the Code reads as under:

> **"Order XXIII WITHDRAWAL AND ADJUSTMENT OF SUITS**
>
> **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.
>
> .....
>
> **(3)** Where the Court is satisfied,-
>
> (a) that a suit must fail by reason of some formal defect, or
>
> (b) 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, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim

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with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) 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."

14. A plain reading of sub-rule (1) of Order XXIII Rule 1 would indicate that the plaintiff may at any time abandon his suit or part of his claim qua all or any of the defendants. In a sense, the right to withdraw the suit or abandon a part of claim is unqualified. Neither the stage of the suit matters nor there is a restriction that the suit must be withdrawn as a whole or against all the defendants.

15. In contrast, sub-rule (3) of Order XXIII Rule 1 confers a discretion on the Court to grant permission to the plaintiff to withdraw from the suit or 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. The right to withdraw the suit with liberty to institute a fresh suit is, qualified by the conditions that: (a) the suit must fail by reason some formal defect, or (b) there are sufficient grounds for allowing the plaintiff to institute a fresh suit on the same subject matter. The discretionary jurisdiction is to be exercised by the Court in

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order to prevent the defeat of ends of justice on technical grounds.

16. Evidently, the abandonment of the suit under sub-rule (1) and withdrawal of a suit with liberty to institute a fresh suit on the same subject matter, stand on a different footing. Distinct considerations come into play in allowing the abandonment of the suit under sub-rule (1) and withdrawal with permission to institute a fresh suit under sub-rule (3). In fact, the permission of the Court under sub-rule (1) for the abandonment of the suit or part of the suit claim, subject to the element of costs, is a matter of course as neither the defendants nor the Court can compell a plaintiff to prosecute the suit which he does not wish to. From this standpoint, the right of abandonment of the suit under sub-rule (1) can be considered to be rather unbridled.

17. In the case of ***M/s. Hulas Rai Baij Nath vs. Firm K. B. Bass***[4]***,*** a Three-Judge Bench of the Supreme Court enunciated that the language of Order XXIII Rule 1(1) of the Code gives an unqualified right to a plaintiff to withdraw from a suit and if no permission to file a fresh suit is sought under sub-rule (2) of that Rule (before the Rule was substituted by 1976 amendment), the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in

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4 AIR 1968 Supreme Court 111.

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respect of that subject-matter under sub-rule (3) of that Rule. There is no provision in the Code of Civil Procedure which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it.

18. In the case of ***Anil Kumar Singh*** (supra), on which reliance was placed by Mr. Deshmukh, the Supreme Court, while highlighting the distinction between the provisions contained in sub-rules (1) and (3) of Rule 1 of Order XXIII, enunciated that a mere withdrawal of the suit without asking for anything more can always be permitted. The observations in paragraphs 23 to 25 are material and, hence, extracted below:

> "23. In our considered opinion, when the plaintiff files an application under Order XXIII Rule 1 and prays for permission to withdraw the suit, whether in full or part, he is always at liberty to do so and in such case, the defendant has no right to raise any objection to such prayer being made by the plaintiff except to ask for payment of the cost to him by the plaintiff as provided in sub-rule (4).
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> 24. The reason is that while making a prayer to withdraw the suit under Rule 1(1), the plaintiff does not ask for any leave to file a fresh suit on the same subject matter. A mere withdrawal of the suit without asking for anything more can, therefore, be always permitted. In other words, the defendant has no right to compel the plaintiff to prosecute the suit by opposing the withdrawal of suit sought by the plaintiff except to claim the cost for filing a suit against him.
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> 25. However, when the plaintiff applies for withdrawal of the suit along with a prayer to grant him permission to file a fresh suit on the same subject matter as provided in sub-rule (3) of Rule 1 then in such event, the defendant can object to such prayer made by the plaintiff. In such event, it is for the Court to decide as to whether the permission to seek withdrawal of the suit should be granted to the plaintiff and, if so, on what terms as provided in sub-rule (3) of Rule 1."

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19. The aforesaid exposition of law is, however, not stage agnostic. The aforesaid proposition govern the withdrawal of the suit or abandonment of a part of a claim before the Court of first instance, primarily. Once, the trial court adjudicates the suit and, resultantly, the rights and obligation of the parties are crystallized, so far as the trial court, different considerations come into play. With the adjudication of the rights and liabilities, the elements of vesting or accrual of rights and the prejudice likely to be caused on account of removing the substratum of those rights and obligation by withdrawing the suit itself, in which those rights and obligations were determined, deserve consideration. The plaintiff, in such a situation, cannot assert the freedom of withdrawing from the suit with equal ease.

20. In the case of ***R. Ramamurthi Iyer vs. Raja V. Rajeshwara Rao***[5]***,*** the question of withdrawal of the suit arose in the context of a suit for partition where the provisions of Sections 2 and 3 of the Partition Act were attracted. The Supreme Court was confronted with the question whether after a share-holder applied for leave to buy at a valuation under Section 3, the other share-holder, who had requested the Court to exercise its power

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5 (1972) 2 Supreme Court Cases 721.

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under Section 2 of ordering sale, can withdraw the suit under Order XXIII Rule 1 of the Code. The Supreme Court held, the answer to this question will depend on the nature of the right or privilege which vests in the co-sharer to seek to derive benefit of the provisions of Section 3. It was difficult to accede to the contention of the appellant therein that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under Section 2 of the Partition Act and the defendant has applied to the Court for leave to buy at a valuation the share of the plaintiff under Section 3. The Supreme Court observed as under:

> "12. Coming back to the question of withdrawal of a suit in which the provisions of Sections 2 and 3 of the Partition Act have been invoked we find it is difficult to accede to the contention of the appellant that the suit can be withdrawn by the plaintiff after he has himself requested for a sale under Section 2 of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff under Section 3. In England the position about withdrawal has been stated thus, in the Supreme Court Practice 1970 at page 334:
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> "*Before Judgment.*- Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly dominus litis or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him".
>
> As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale under Section 3 of the Partition Act he obtains an advantage in that the court is bound thereafter to order a valuation and after getting the same done to offer to sell the same to such shareholder at the valuation so made. This advantage, which may or may not fulfill the juridical meaning of a right, is nevertheless a privilege or a benefit which the law confers on the shareholder. If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of Section 3(1) it would only enable the plaintiff to defeat the purpose of Section

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> 3 (1) and also to deprive the defendant of the above option or privilege which he has obtained by the plaintiff initially requesting the court to sell the property under Section 2 instead of partitioning it. Apart from these consideration it would also enable the plaintiff in a partition suit to withdrawal that suit and defeat the defendants claim which, according to Crump cannot be done even in a suit where the provisions of the Partition Act have not been invoked."

21. In the case of ***R. Rathinavel Chettiar*** (supra) the Supreme Court after a survey of large body of authorities considered the question, can the decree be destroyed by making an application for dismissing the suit as not pressed or unconditionally withdrawing the suit at the appellate stage, and answered the same in the following words:

> "8. The question in the present case is, however, a little different. If the suit has already been decreed or, for that matter, dismissed and a decree has been passed determining the rights of the parties to the suit, which is under challenge in an appeal, can the decree be destroyed by making an application for dismissing the suit as not pressed or unconditionally withdrawing the suit at the appellate stage. It is this question which is to be decided in this appeal.
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> .....
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> 11. Once the matter in controversy has received judicial determination, the suit results in a decree either in favour of the plaintiff or in favour of the defendant.
>
> 12. What is essential is that the matter must have been finally decided so that it becomes conclusive as between the parties to the suit in respect of the subject matter of the suit with reference to which relief is sought. It is at this stage that the rights of the parties are crystallised and unless the decree is reversed, recalled, modified or set aside, the parties cannot be divested of their rights under the decree. Now, the decree can be recalled, reversed or set aside either by the Court which had passed it as in review, or by the Appellate or Revisional Court. Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. It is for this reason that the proceedings either in appeal or in revision have to be allowed to have a full trial on merits.

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> .....
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> 22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in parties to the suit under the decree cannot be taken away by withdrawal of suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained."

22. The aforesaid pronouncements were followed by the Supreme Court in the case of ***Sneh Gupta vs. Devi Sarup and others***[6]***,*** wherein it was postulated that it is also well-known that a suit cannot be withdrawn by a party after it acquires a privilege.

23. In the case of ***Avenue Supermarts Private Limited vs. Nischint Bhalla and others***[7]***,*** after following the aforesaid decisions in the case of ***R. Rathinavel Chettiar*** (supra) and ***Sneh Gupta*** (supra), the Supreme Court ruled that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree.

24. The position which thus emerges is that, generally, it is the prerogative of the plaintiff to unconditionally withdraw a suit or abandon a part of his claim. The plaintiff being *dominus litis* cannot be compelled to prosecute the suit if he does not wish to.

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6 (2009) 6 Supreme Court Cases 194.

7 (2016) 15 Supreme Court Cases 411.

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This right to withdraw the suit is, in a sense unqualified or unfettered, till the other parties to the Suit acquire rights or privilege. With the passing of a decree, normally, the rights and obligations of the parties are crystallized. Thus, if the suit is sought to be withdrawn at the stage of appeal, the Court is required to pose unto itself a question as to whether the plaintiff can be permitted to withdraw the suit without divesting a party of the rights and privileges which have accrued in favour of such party on account of the decree. Thus, the plaintiff does not have an unqualified or unfettered right under Order XXIII Rule 1(1) of the Code to withdraw the suit at the appellate stage.

25. If the withdrawal has the effect of depriving one of the parties to the suit of the benefit of the first court's adjudication in his favour, such permission for withdrawal may not be granted. Likewise, if the withdrawal has the effect of destroying or nullifying the decree affecting thereby the rights of the parties, vested under the decree, withdrawal cannot be permitted as a matter of course. It would then be in the sound discretion of the Court having regard to entire gamut of the circumstances, especially where despite such adjudication a strong case is made out in favour of the plaintiff.

26. Reverting to the facts of the case, it is necessary to examine the nature of the adjudication by the trial court and

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the impact of the withdrawal of the prayer of declaration qua the employment on the said adjudication.

27. A bare perusal of the judgment of the trial court would indicate that the pivotal question that arose for determination was, whether the plaintiff is an employee of the defendant company and was entitled to seek a declaration that he continued to be an employee of the defendant company. After an elaborate consideration of the evidence and the governing provisions of law, the trial court returned a finding that the plaintiff failed to prove that he worked as an employee of the defendant company after 31st March, 2004. In law, the plaintiff was not entitled to seek a declaration that he continued to be in the employment of the defendant and the mandatory injunction to pay the salary month by month, as it involved a contract of personal service.

28. The adjudication by the trial court has thus resulted in a declaration in favour of the defendant that with effect from 10th March, 2004 the plaintiff is not an employee of the defendant and the defendant is not liable to pay salary for April, 2004 onwards. In this context, the nature of the abandonment of part of the prayer deserves to be appreciated. The prayer clause (b), a part of which the plaintiff seeks to abandon, reads as under:

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> "b) *It is to be declared that the plaintiff is an employee of the Defendant Company* and Defendant Company be ordered by way of mandatory injunction to pay the salary as mentioned in para 3 above to the plaintiff from April 2004 onwards alongwith interest at the rate of 12% p.a."

29. The italicised portion, the plaintiff seeks to abandon. Evidently, prayer clause (b) comprises a composite prayer of declaration and mandatory injunction. However, the prayer of mandatory injunction seems to be inextricably intermingled with the prayer of declaration. In fact, the fate of the prayer of mandatory injunction hinges upon the declaration in the first part of the prayer clause (b), which the plaintiff now seeks to abandon. In the context of the nature and structure of prayer clause (b), I find substance in the submission of Mr. Adgule that the declaration of employment is the principal prayer in the suit and injunction is essentially consequential thereto.

30. The reliance placed by Mr. Adgule on the decision of the Supreme Court in the case of ***Padhiyar Prahaladji Chenji*** (supra) appears to be well-founded. In the said case, it was enunciated that an injunction is a consequential relief and in a suit for declaration with a consequential relief of injunction, it is not a suit for declaration simpliciter. It is a suit for declaration with a further relief. Whether the further relief claimed in a particular case as a consequential upon a declaration, is adequate must always depend upon the facts and circumstances of each case.

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Where once a suit is held not maintainable, no relief of injunction can be granted.

31. Since the relief of declaration that the plaintiff is an employee of the defendant company constitutes the linchpin of the plaintiff's case and the trial court has categorically returned a finding that the plaintiff failed to establish the said fact and is not entitled to such declaration, in my considered view, the said adjudication enures to the benefit of the defendant. The abandonment of the said prayer, at the appellate stage, without abandoning the prayer of mandatory injunction, has the propensity to destroy the right which has accrued in favour of the defendant on account of the decree passed by the trial court. In these circumstances, the plaintiff cannot be permitted to abandon the said prayer as it would cause prejudice to the defendant.

32. The learned District Judge, thus, committed no error in declining to grant permission to abandon a part of the prayer. I am, therefore, not inclined to interfere with the impugned order. The petition, thus, deserves to be dismissed.

33. Hence, the following order:

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: O R D E R :

(i) The petition stands dismissed.

(ii) Rule discharged.

No costs.

[N. J. JAMADAR, J.]

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