

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CM(M) 1339/2013 & CM 19889/2013 (stay)**

% Reserved on: 17th April, 2015
Decided on: 18th May, 2015

SMT PRAVEEN SHARMA

..... Petitioner

Through: Mr. Rajat Aneja, Ms. Rashmi Verma
and Mr. Kartikeya Bhargava,
Advocates.

versus

SHRI JAI PRAKASH SHARMA AND ORS

..... Respondents

Through: Mr. Sanjay Sharma, Advocate for
Respondent Nos.2 and 3.

CORAM:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. Aggrieved by the order dated 26th October, 2013 whereby the application of the Petitioner under Order XXIII Rule 1 (3) (b) CPC was dismissed the Petitioner prefers the present petition.

2. The Petitioner Smt. Praveen Sharma filed a suit against Jai Prakash Sharma, his wife Asha Sharma and Ms. Ashima Sharma, the Defendants and Respondents herein seeking mandatory injunction and directions to the Defendants to vacate and hand over the possession in respect of one room on first floor of property No. H-34, Rajouri Garden, New Delhi being owner of half portion of property No. H-34, Rajouri Garden, New Delhi (in short 'the suit property'). The Respondents filed the written statement and the counter claim. In the written statement it was stated that the Petitioner had no locus standi or any legal right to file the suit against the Defendant Nos. 2 and 3 as she was not the absolute owner of the suit property or owner of half portion of the suit property, rather her husband along with the Defendants was the

co-sharer/co-owners of the suit property. The valuation was also challenged and it was stated that the Respondent Nos. 2 and 3 herein have already filed a suit for declaration along with the consequential reliefs against the Petitioner which was pending before the learned Civil Judge being Suit No. 130/2012. Challenge was also made to the pecuniary jurisdiction and the court fees filed. It was stated that the property belongs to Ganesh Dass Sharma on whose death it devolved upon his two sons Shyam Lal Sharma and Uttam Chand Sharma. The Respondent No. 1 is son of late Shyam Lal Sharma and Respondent No. 2 and 3 are Respondent No.1/Defendant No.1's wife and adopted daughter respectively. The property was yet to be partitioned between Shyam Lal Sharma and Uttam Sharma by metes and bounds. Concealment of facts is also pleaded in the written statement. The Will dated 15th May, 1998 was stated to be forged and fabricated and never executed by Shyam Lal Sharma. In the counter claim the Respondents sought a decree of declaration declaring the alleged family settlement by Shyam Lal Sharma in favour of the Petitioner and affidavits of Jai Prakash Sharma, Krishna Devi and Kamla as null and void and the alleged Will dated 15th May, 1998 allegedly executed by late Shyam Lal Sharma also as null and void.

3. After the counter claim was filed the Petitioner filed the application as noted above. The grounds taken in the application under Order XXIII Rule 1 (3) (b) CPC read with Section 151 CPC are that the Plaintiff engaged another counsel to seek expert legal advice and on going through the entire factual conspectus of the matter it was advised that the present suit be withdrawn with liberty to file a fresh suit with appropriate relief in respect of the same subject matter and on the same cause of action to avoid any technical

objection at a later stage. Thus to avoid any technical objection which will prove fatal at later stage as a matter of abundant caution the Petitioner/Plaintiff sought permission to withdraw the suit with liberty to file a fresh suit in view of the multifarious complications. It was also stated that the suit was at the stage of completion of pleadings and the trial had not started.

4. Vide the impugned order the learned Civil Judge observed that the present suit was filed on 10th January, 2012 and the pleadings were completed after a span of nearly two years. In view of the law of limitation, to bring a completion to any kind of litigation, the Petitioner cannot be permitted to juggle with facts and to take shelter of flaws in technicalities to harass the defendants. The Petitioner ought to have pleaded true facts in the plaint and thus cannot be now permitted to change as per his convenience.

5. Learned counsel for the Petitioner relying upon the decision in Baniram and others vs. Gaiind and others, AIR 1982 SC 789; Sugathan K.R. vs. Jyothi, 2014 (3) KLJ 470; Brajamohan Sabato vs. Sarojini Panigrahi and another, AIR 1975 Orissa 39, Ram Kumar vs. Om Prakash, Manu/HP/1008/2014 and Rajendra Kumar Mahor Gupta vs. Anil Kumar Mahor Gupta, LAWS (MPH)-2007-4-2 contends that in case of technical defect that would result in dismissal of the suit, the Plaintiff should be permitted to withdraw the suit with liberty to file a fresh one.

6. Learned counsel for the Respondent on the other hand contends that the Petitioner concealed the proceedings pending in the various Courts including this Court. The plaint was bereft of details and concealed material facts. After the Respondents filed their counter claim, the Plaintiff cannot be permitted to take the benefit of his own wrong and he has to explain

sufficient cause for withdrawal with liberty to file fresh suit. Reliance is placed on Mahadeoji Chandreswarji vs. State of Rajasthan and others, AIR 2003 Rajasthan 4 and Gurudayalsing vs. Basant Singh, 2015 (1) Civil Court Cases 297 (Bombay).

7. I have heard learned counsel for the parties.

8. Order XXIII Rule 1 CPC provides as under:

“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.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

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

9. From the reading of sub-clause (b) it is evident that the Plaintiff must show sufficient cause for permitting it to institute a fresh suit for the entire claim or part of the claim. The plaintiff can be permitted to withdraw with liberty to file a fresh suit only if there is technical defects due to which the plaint would suffer a dismissal however, in a case where there is material concealments of facts which were in the knowledge of the Plaintiff and after the Respondent exposes the same in the written statement and the counter claim, the Plaintiff cannot set at knot the entire process that has to follow by taking recourse to the provision of Order XXIII Rule 1 (3) CPC. .

10. The Supreme Court in Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior and Ors., AIR 1987 SC 88 considered and explained the scope of the provisions under Order XXIII Rule 1 CPC and held that sub-rule (3) of Rule 1 of Order XXIII CPC is founded on public policy. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason, the code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XIII.

11. In Ram Kumar vs. Om Prakash, 2014 SCC OnLine HP 4895 the learned Single Judge discussed the provisions of Order XXIII Rule 1(3) CPC and noted:

“12. A perusal of sub rule (3) of Rule 1 Order 23 of Code of Civil Procedure makes it abundantly clear that no litigant can be allowed to file suits one after the other for the same cause of action, which is not only to cause harassment to the party against whom it is filed, but it has also the

unnecessary impact on the public exchequer and unnecessary load on the court-time. The object of sub rule (3) is that there may be certain technical factors on account of which a suit may fail though the plaintiff may have a good case on merits and, therefore, this may result in failure of justice and in such cases the Court normally would give permission to withdraw the suit with a liberty to file a fresh one. However, such permission can be granted only if the conditions set out therein are satisfied. The formal defect as contemplated under this provision, may include many kind of defect and the same essentially are those which do not affect the merits of the case. The defect so contemplated, in particular deal with the form prescribed by rules of procedure, mis-joinder of parties, cause of action etc. The defect as is sought to be pointed out by the petitioner by no stretch of imagination can be said to be a formal defect.”

12. In Mahadeoji Chandreswarji Vs. State of Rajasthan AIR 2003 Rajasthan 4 it was held-

17. In view of the above, the legal position can be summarised that the provisions of O. 23, R. 1 of the Code are based on public policy not to give an opportunity to a litigant to abuse the process of the Court. However, in certain circumstances, he can be permitted to withdraw the suit with liberty to file a fresh, only in case he shows the “sufficient grounds” as mentioned in Clause (a) or (b) of sub-rule (3) of R. 1 of O. 23. The suit can be withdrawn even at the appellate stage but it is not permissible for a litigant to defeat the accrued right of the other party by withdrawing the suit. The Court has been conferred discretion to permit a litigant to withdraw the suit only if “sufficient ground” is shown warranting such a permission.”

13. Thus, the twin requirements of the provisions of sub-rule (3) of Rule-1 of Order XXIII of CPC are that there is a formal defect in the suit instituted

which would result in dismissal of the suit and the applicant has been able to show sufficient cause, that is, the reason of withdrawal is not vexatious or mala fide.

14. In the application, the petitioner has not been able to show any sufficient cause whereas the defendants/respondents have demonstrated concealment of material facts, thus the application being vexatious and malafide, the learned Trial Court committed no error in declining to grant permission to file a fresh suit.

15. Petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

MAY 18, 2015

‘vn’