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

Date of Decision: 12th October, 2021

+ **C.R.P. 71/2021**

MOHD. NAVED & ORS. Petitioners

Through: Mr. Rudra Pratap with Mr. Ankit
Kashyap, Advocates for P-1
(M:8699979909)

versus

FARHA REHMAN Respondent

Through: None

CORAM:
JUSTICE PRATHIBA M. SINGH

Prathiba M. Singh, J. (Oral)

1. This hearing has been done through video conferencing.

CM APPL. 35023/2021 (for exemption)

2. Allowed, subject to all just exceptions. Application is disposed of.

C.R.P. 71/2021 & CM APPL. 35022/2021 (for stay)

3. The present petition challenges the impugned order dated 28th August, 2021, passed by the Id. ASCJ, Karkardooma Courts Delhi in **CS No. 734/18** titled ***Farha Rehman v. Mohd. Naved***, by which an application under Order XXIII Rule I (3) (b), CPC filed by the Plaintiff/Respondent herein, has been allowed. Vide the impugned order, the Plaintiff has been allowed to withdraw the suit, with liberty to file a fresh one. The relevant extract of the impugned order is set out below:

“Therefore, having considered the stage of the present suit, multiple causes of action, sought to be arrayed by the plaintiff in a fresh suit and the case

laws discussed above, this court in the interest of justice and for filing comprehensive suit covering all possible disputes between parties related to all subject matters even beyond that of present suit between them under relevant law, finds that there are sufficient grounds for granting permission to the plaintiff for withdrawal of present suit with liberty to her to institute a fresh suit including subject matter of the present suit in terms of Order 23 Rule 1 (3) (b) of CPC. Consequently, other pending application of any party, if any is not required to be dealt with in view of permission to the plaintiff to withdraw the present suit with liberty to file fresh one in terms of Order 23 Rule 1 (3) (b) of CPC. With above observations, the said application of plaintiff is hereby allowed.”

4. The Plaintiff is the sister of the Defendant/Petitioner herein. She has filed a suit for permanent and mandatory injunction, before the Trial Court, with the following prayers:

“1. Pass an order and/or Decree in favour of Plaintiff and against Defendants for Permanent and Mandatory Injunction preventing Defendants to dispose of or create any third party right or sell or dispose off or create any charge in the properties of father and mother of plaintiff without the leave of this Hon’ble Court or without the lawful parties of the properties of the deceased father and mother of the Plaintiff whichever is earlier.

2. Pass an order/Decree in favour of Plaintiff and against Defendants directing the Defendants to handover all account details of business, properties and a factory run in the property or A-5, Priyadarshini Vihar, Laxmi Nagar, Delhi-110092.

3. Pass an order and/or Decree in favour of Plaintiff and against the Defendant for mandatory

injunction to share all account details relating to every business, factory and properties of the deceased father and mother of Plaintiff till the valid partition of the same as per law.

4. Pass an order and/or Decree in favour of Plaintiff and against the defendant for mandatory injunction direction Defendants not to interfere in lawful enjoyment of business, factory and properties of deceased mother and father of Plaintiff without following the law.

5. Pass any other or further order and/or Decree in favour of Plaintiff and against Defendants as this Hon'ble Court may deem fit in the interest of justice and equity."

5. During the pendency of the said suit for injunction, an application under Order VI Rule 17 CPC was also moved by the Plaintiff, by which she sought to add certain further properties in the suit and also sought further reliefs. However, during the pendency of the said application for amendment, the Plaintiff filed an application to withdraw the suit, with liberty to file a fresh suit. The reasons given in the application for withdrawal under Order XXIII Rule 1 CPC are as under:

"2. That at the time of instituting the present plaint, the plaintiff being a married daughter of her parents was not having knowledge regarding the entire moveable and immovable properties of her deceased parents therefore she thought it proper to first institute a suit praying therein for a blanket permanent injunction against the defendants in order to prevent them from selling, disposing or creating any third party interest or charge in her deceased parent's properties and simultaneously praying for direction against defendants (particularly against defendant No.1) to share

accounts of factory run at ground floor of house and share all accounts of all properties of deceased parents however defendants have not disclosed the detail sought by the plaintiff till date rather the plaintiff has come to know that several be beghas of land situated in Village Dehra, Hapur, UP of deceased father and several other moveable and immovable properties belonging to deceased parents of the plaintiff have already been sold by the defendant No.1 in connivance of other defendants and people having vested interests, he has also given several properties on rent and he is further in the process of selling, disposing converting, or creating third party interest or charge in the deceased parent's properties.

3. That during pendency of the suit the plaintiff has come to know that paternal uncle of the plaintiff should also be made a defendant as he is also having possession and knowledge and even sold off some of the properties of her deceased parents.

4. That during the pendency of the suit defendants have produced a false and fabricated WILL dated 07.02.2017 before the court alleging to be executed by deceased father of the plaintiff which is required to be declared as null and void.

5. That the plaintiff has decided to claim a decree of rendition/disclosure of accounts against the defendants, seek partition; recovery of possession, mesne profits and pecuniary injunction and claim her share in all the properties of her deceased parents due to which entire plaint, and pecuniary jurisdiction of the court are bound to be changed therefore the present plaint is required to be withdrawn and a fresh suit on the same subject matter of the suit is required to be instituted by the plaintiff"

The plea of the Plaintiff was that at the time of filing of the suit, she was not aware of the details of all the properties of her parents. Thus, she sought a blanket injunction. One of the prayers was for injunction till partition took place. During the pendency of the suit, she has learnt of various other properties of her parents, *qua* which she wishes to file a separate comprehensive suit. Thus, the prayer for withdrawal with liberty to file a fresh suit.

6. The said application was heard by the Trial Court, which has, vide the impugned order, permitted her to withdraw the suit with liberty to file a fresh suit, if needed.

7. This order permitting the Plaintiff to withdraw her suit and giving liberty, has been challenged in the present revision petition, under Section 115 of the CPC.

Submissions of ld. Counsel for the Defendant/Petitioner

8. Ld. counsel for the Defendant submits that under an identical fact situation, the Guwahati High Court has taken a view in ***Pushpendra Nath Borah v. Lalit Chandra Bora 2014 Law Suit (Gau) 624***, that a fresh suit would not be maintainable and so no liberty could have been granted. He submits that the same would be barred under Order II Rule 2 CPC. He relies upon the language of Order XXIII Rule 1 (3) (a) & (b) to argue that in sub-rule 3(b), the phrase- ‘sufficient grounds’ would have to be read analogously with sub-rule 3(a) and, therefore, the said ground has to be analogous to a ‘formal defects’.

9. It is his submission that in the original plaint, the Plaintiff has failed to seek partition, and now by giving liberty to the Plaintiff, the Court has

permitted the Plaintiff to add reliefs *qua* a suit for partition, which would not be permissible in law.

10. Mr. Rudra Pratap, Id. Counsel, submits that in the abovementioned judgment of the Guwahati High Court, specific reliance is placed on judgment of the Bombay High Court in ***Ramrao Bhagwantrao Inamdar & Anr. v. Babu Appanna Samage & Ors.*** 1940 AIR (Bom) 121 (FB) wherein the entire historical background of Order XXIII Rule 3 CPC has been discussed by the full bench of the Bombay High Court.

11. He submits that the Trial Court has, in fact, in the impugned order, followed the contrary opinion of the Orissa High Court ***Trinath Basant Ray Vs. S.K. Mahamood***, 2019 SCC Online Ori 10, and has not followed the rationale of the Guwahati High Court. Thus, it is clear there is a clear divergence of opinion between different Courts on this issue.

12. Mr. Pratap has further attempted to distinguish the judgment of the Orissa High Court in ***Trinath Basant Ray*** (*supra*) wherein the Division Bench of the High Court agreed with the judgment of the Supreme Court in ***Atul Krishna Roy v. Raukishore Mohanty*** AIR 1956 Ori 77 and upheld the formulation that “sufficient grounds” under Order XXIII Rule 1(3)(b) are wide enough to brace other defects as well, and is not restricted to ‘formal defects’. He relies upon the judgment of the Supreme Court in ***Sarguja Transport Services vs. State Transport Appellate Tribunal*** (1987) 1 SCC 5 to draw a distinction.

13. He finally submits that the Trial Court has wrongly relied upon ***Beniram and ors. v. Gaiind and ors.*** (1981) 4 SCC 209, wherein there is no discussion on Order XXIII Rule 1. Hence, according to him, the same could not have been the basis of the order of the Trial Court.

Analysis and Findings

14. This Court has considered the submissions made on behalf of the Defendant/Petitioner and has perused all the judgments cited.

15. The present petition is one seeking Revision under Section 115 CPC. The scope of such a petition is limited in nature. The factual background of this case is that the parties are siblings and the Plaintiff seeks various orders in respect of her parent's properties including mandatory injunction and rendition of accounts, till a valid partition can be effected.

16. During the course of the proceedings in the suit, the Plaintiff-sister realised that there are other properties which ought to be included in the common kitty as well. She filed an application for amendment of the plaint, however at a later stage, instead of amending the suit, she filed an application to withdraw the suit, with liberty to file a fresh suit. The Trial Court, vide the impugned order, has allowed her application to withdraw the suit with liberty in the following terms:

*“Having considered the above cited judgments, this court is of the considered view that the judgment of Hon'ble Supreme Court of India in the case of **Sarguja Transport Service (supra)** does not apply to the present facts and circumstance of the case as it was primarily related to the applicability of the principle underlining Order XXIII Rule 1 (3) (b) of CPC in respect of writ petition under Articles 226/227 of the Constitution of India. As regards another judgment of the Hon'ble Gauhati High Court in the case of **Pushpander Nath Borah (supra)**, wherein the court has held that permission for withdrawal may be granted by the court only if defects are found to be of form and not of substance. However, it is noticeable that in **Pushpander Nath Borah (supra)**, Hon'ble Gauhati High Court denied the permission to the*

plaintiff who wanted to change the very nature of acquiring of property in question and the relief of the previous suit. Further, Hon'ble Orissa High Court in **Trinath Basant Ray Vs. S.K. Mahamood, 2019 SCC Online Ori 10** while relying on the Hon'ble Supreme Court's decision in **K.S. V. Kokila, (2000) 5 SCC 458**, observed as under:-

(13) 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 the suit must pay by reason of some formal defect, and the other where the court is satisfied that there are sufficient ground for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim.....

Therefore, the Orissa High Courts held that other "sufficient grounds" must not be restricted to "formal defect" or defects analogous thereto and the terms is wide enough to include other defects as well since this is what the legislature had intended by putting the formal defect and sufficient grounds in two different clauses of Sub rule 3 of Order 23 of CPC.

Accordingly, in view of the said contrary opinion of the Hon 'ble Orissa High Court and different set of facts of present case, the Judgment of **Pushpander Nath Borah (supra)** heavily relied by the defendant's side does not hold much persuasive value in the humble and considered opinion of this court. It is also noteworthy that the observations of Hon'ble Orissa High Court in **Trinath Basant Ray (supra)** passed in year 2019, are pertinent and offer more valuable guidance for the trial court while dealing with the scope of formal defect and sufficient grounds for allowing the plaintiff to institute

fresh suit in terms of Sub-rule 3 of Rule 1 of Order 23 of CPC.

*The Hon'ble Supreme Court in the case of **Beniram & Ors. V. Gaiind & Ors**, (1981) 4 SCC 209 permitted withdrawal of the suit with liberty to file a fresh suit on the same or on a different cause of action wherein a point was raised in the appeal which was not raised in the plaint. Vide said order in case of **Beniram & Ors. (supra)** the Hon'ble Supreme Court had allowed withdrawal wherein a different cause of action was sought to be raised by the plaintiff thereby treating the same to be a sufficient cause warranting withdrawal of the suit by the plaintiff in terms of Sub-rule 3 (b) of Rule 1 of Order 23 of CPC.*

Coming to the facts of the present case, the plaintiff intends to withdraw the present suit for permanent and mandatory injunction, wherein issues are yet to be framed in respect of subject matter of the present suit. Further, the plaintiff seeks the permission of the court under Order 23 Rule 1 (3) (b) of CPC for instituting a fresh comprehensive suit wherein she may be intending to seek various other reliefs including decree of partition and possession, rendition/disclosure of accounts, declaration to declare the will allegedly executed by her deceased father as null and void, mesne profit and permanent injunction as well as claim of her share in all properties of her deceased parents, which could not be made part of the suit property of the present suit for want of knowledge on part of plaintiff being a daughter of her parents at the time of institution of present suit. At this stage, the version of the plaintiff cannot be discounted, and she cannot be said to be not entitled to file fresh comprehensive suit as per prevailing law, which will be ultimately decided on the merit by the concerned competent court of law after affording fair opportunity to the defendants as well as dealing with their objections, if any. Therefore,

having considered the stage of the present suit, multiple causes of action, sought to be arrayed by the plaintiff in a fresh suit and the case laws discussed above, this court in the interest of justice and for filing comprehensive suit covering all possible disputes between parties related to all subject matters even beyond that of present suit between them under relevant law, finds that there are sufficient grounds for granting permission to the plaintiff for withdrawal of present suit with liberty to her to institute a fresh suit including subject matter of the present suit in terms of Order 23 Rule 1 (3) (b) of CPC. Consequently, other pending application of any party, if any is not required to be dealt with in view of permission to the plaintiff to withdraw the present suit with liberty to file fresh one in terms of Order 23 Rule 1 (3) (b) of CPC. With above observations, the said application of plaintiff is hereby allowed. File be consigned to record room after due compliance.”

17. The reasoning of the Trial Court, as is evident from the above-extracted order, is based on the finding that the Plaintiff wishes to file a comprehensive suit, in accordance with law, which would be decided on merits. The fact that there was an amendment application does not in any manner prevent the Plaintiff from filing a fresh suit. Mr. Pratap also fairly concedes to the fact that the plaint in this case could have been amended by the said application which was moved.

18. Order XXIII Rule 1 (3) was specifically brought in post the amendment of Order XXIII Rule 1 by section 74 of the Act 104 of 1976, titled *The Code of Civil Procedure (Amendment) Act, 1976*. The said Rule, prior to the amendment in 1976, read 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, withdraw his suit or abandon part of his claim.

(2) Where the Court is satisfied—

- (a) that a suit must fail by reason of some formal defect, or*
- (b) that there are **other** 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 abandon part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim.

xxx”

19. The said provision was amended by the Act 104 of 1976. The provision as it currently stands, reads as under:

“ORDER XXIII
Withdrawal and Adjustment of Suits

1. Withdrawal of suit or abandonment of part of claim—

xxx

(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.

xxx”

20. A perusal of the unamended provision, specifically sub-rule 2(b), clearly shows that the phrase used was “**other** sufficient grounds”. This position has been changed by the amendment in 1976. The provision, as it currently stands, only mentions “sufficient grounds”, and is no longer qualified by the word “other”.

21. The judgment of the Guwahati High Court in **Pushpendra Nath Borah (supra)**, which has been relied upon by Mr. Pratap, Id. Counsel, had cited the judgment of the full bench of the Bombay High Court in **Ramrao Bhagwantrao Inamdar (supra)**. The said judgment, while analysing the unamended provision held as under:

“In the Code of 1908, the only change made in the wording of Cl. (b) was the addition of “other” before the words “sufficient grounds”. In (1911) 1 MWN 105 the addition of the word “other” was held to suggest that the “sufficient grounds” must be ejusdem generis with the “formal defects” under Cl. (a). This view was accepted by Beasley J. in AIR 1925 Mad 1268. With respect, we do not think the word “other” suggests anything of the kind. It simply means “other than” the ground mentioned in Cl. (a). By way of analogy, it may be pointed out that in 49 IA 144 : (AIR 1922 PC 112) their Lordships of the Privy Council interpreted the words “any other sufficient reason” appearing in O. 47, R. 1 of the CPC., 1908, as meaning “a reason sufficient on grounds at least analogous to those specified immediately previously,” and that interpretation is binding upon us. In our opinion, there is a distinct difference between the Latin phrase “ejusdem generis” and the words “at least analogous,” the former being more restrictive than the latter. On the principle of ejusdem generis, the meaning of a general word is wholly restricted to the same genus to which the

preceding word or words belong. The expression means “of the same kind,” whereas “analogous,” according to Chambers's Twentieth Century Dictionary means “bearing some correspondence with or resemblance to; similar in certain circumstances, or relations.”

22. In any case, in the Guwahati High Court judgment in ***Pushpendra Nath (supra)***, the Plaintiff had categorically admitted that the defect could not have been cured by way of an amendment to the plaint. This fact is contrary to the admitted position in the present case, where Mr. Pratap, Id. Counsel for the Defendant has fairly conceded that the plaint could have been amended to the effect of adding the remedy sought by the Plaintiff. Accordingly, the said decision is not applicable to the facts of the present case

23. Mr. Pratap, Id. Counsel, also placed reliance on the judgment of the Supreme Court in ***Sarguja Transport Services (supra)***. The judgment in ***Sarguja (supra)*** was rendered by the Supreme Court in the context of whether a fresh writ petition could be filed under Article 226/227, after withdrawing an earlier writ petition dealing with the same cause of action, without permission from the Court. It was in this context that the Supreme Court had held that the principle underlying Order XXIII Rule 1 of the CPC should be extended in the interests of administration of justice to cases of withdrawal of writ petitions, on the ground of public policy. This judgment did not deal with a situation where permission was sought and liberty was granted, or not granted, to institute a fresh suit or petition. The Supreme Court in this case merely emphasized on the fact that a litigant cannot abandon or withdraw petitions and keep instituting fresh petitions, without

seeking liberty of the Court. Accordingly, the said decision is not applicable to the facts or the legal question that has arisen in the present case.

24. Mr. Pratap, Id. Counsel, has vehemently argued that the rationale of the Orissa High Court in *Trinath Basant Ray (supra)* that has been followed by the Trial Court, is in ignorance of the reasoning given by the Guwahati High Court.

25. In *V. Rajendran and Another v. Annasamy Pandian through LRs (2017) 5 SCC 63*, the Supreme Court was concerned only with a 'formal defect' in the facts of the said case. The Supreme Court, although, went on to leave the question of whether sub clause (b) needs to be read independent of sub clause (a) or not, open. The Supreme Court observed:

"11. In terms of Order XXIII Rule 1(3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word "sufficient grounds", there are two views: One view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause(b) should be read independent of the words a 'formal defect' and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with "formal defect" envisaged under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is "sufficient grounds"."

26. The Calcutta High Court in ***Archana Roy v. Dipanjan Bhattacharjee***, ***AIR 2019 Cal 165***, has affirmed the view of the Orissa High Court in ***Trinath Basant Ray (supra)*** and held:

“18. The said issue was considered by a larger Bench of the Orissa High in the case of TRINATH BASANT RAY & ANOTHER Vs. Sk. MOHAMMOD & ANOTHER in WP(C) NO. 1813 OF 2004. The larger Bench of Orissa High answered the said issue in negative by approving the view of the learned Single Judge of the Orissa High Court in the case of ATUL KRUSHNA ROY Vs. RAUKLSHORE MOHANTY AND OTHERS reported in AIR 1956 ORISSA 77

19. Clauses (a) and (b) of sub-rule 3 of Order 23 Rule 1 of the Code provides two alternatives, therefore, there is no justification for restricting the meaning of the expression other "sufficient grounds" appearing in clause (b) of sub-rule 3 of Order 23 Rule 1 of the Code only to the formal defects or those analogous thereto as has been held by the learned Single Judge of the Orissa High Court in AIR 1956 ORISSA 77 (supra).”

27. Recently, the High Court of Kerala, in ***Sabu Issac vs. Antony Chacko***, ***(2021) 220 AIC 821***, looked at all the relevant case law in respect of Order XXIII Rule 1(3), and held that “sufficient ground” in clause (b) of Rule 1(3), is a separate and distinct ground, and cannot be restrained by being read in context of a ‘formal defect’. The Court held:

“27. Therefore, the expression "sufficient grounds" occurring in clause (b) of Rule 1(3) of Order XXIII of the Code is not to be read ejusdem generis with the expression "formal defect" occurring in clause (a). There is no requirement that "sufficient ground" pleaded by the plaintiff for seeking permission to

withdraw the suit with liberty to institute fresh suit shall be O.P.(C) Nos.123/2020 and analogous to a formal defect. There can be no reason as to why the import and amplitude of the expression "sufficient grounds" in clause (b) of Rule 1(3) of Order XXIII of the Code should suffer any unwarranted confinement."

28. A perusal of the judgment of the full bench of the Bombay High Court, and various other judgments dealing with the erstwhile provision of the Act, shows that conflicting decisions, where some High Courts read sub clause (b) *ejusdem generis* with sub clause (a), and some High Courts opined against the said view, reading it merely analogously or separately, had their genesis due to the presence of the word "other". The said word having been deleted by the 1976 Amendment to the CPC, clearly leads to the conclusion that sub-clause (a) and sub-clause (b) under Rule 1(3) of Order XXIII, as it presently stands, deal with separate categories of withdrawal – first dealing with some 'formal defect', and the latter dealing with 'sufficient grounds' being there for liberty to file a fresh suit to be granted.

29. This Court is of the opinion that the decision of the Orissa High Court in ***Trinath Basant Ray (supra)*** which held that the expression "sufficient grounds" in clause (b) need not be restricted to 'formal defects', or defects that are analogous thereto, is the correct position of law, in light of the legislative history of the provision, the conflicting judgments prior to the omission of the word "other" from clause (b), and the intention of the provision to give a wide discretion to the Court to allow for withdrawal of suits, with liberty, in the interests of justice. The Supreme Court had left this issue open in ***V. Rajendran (supra)*** as the said case dealt with a formal

defect. However, this Court unhesitatingly agrees with the view taken by the Kerala High Court in *Sabu Issac (supra)*.

30. At this stage, Mr. Pratap, Id. Counsel, submits that the Plaintiff herein previously had the option of filing a suit for partition but chose not to. In the opinion of this Court, this may not be true. Though the prayers in the suit, as extracted in paragraph 4, are not happily worded, when read as a whole, the prayers clearly show that the intention of the Plaintiff is to have a valid partition in accordance with law, as is clear from prayer No.3 in the suit.

31. Accordingly, in view of the legislative history of Order XXIII Rule 1 (3)(a) and (b) of the CPC as set out above, the judgments of the Supreme Court, Orissa High Court, Calcutta High Court and the Kerala High Court, as also the fact that Mr. Pratap, Id. Counsel, fairly conceded that the plaint could have been amended, in the facts of this case, to the effect of adding the remedy sought by the Plaintiff, this Court is of the opinion that the impugned order, which gives liberty to the Plaintiff to file a fresh suit, constitutes “sufficient grounds” under order XXIII Rule 1(3)(b).

32. The present revision petition is dismissed. All pending applications are also disposed of.

PRATHIBA M. SINGH
JUDGE

OCTOBER 12, 2021

mw/AK

(corrected & released on 16th October, 2021)