

**IN THE HIGH COURT AT CALCUTTA
(Ordinary Original Civil Jurisdiction)
ORIGINAL SIDE**

Present:

The Hon'ble Justice Krishna Rao

**G.A. No. 3 of 2022
In
CS No. 140 of 2022**

**Archana Bajoria
Versus
Radha Devi Khemka & Ors.**

Mr. Aniruddha Bhattacharjee
Mr. Rajesh Upadhyay
Mr. Arnab Roy
Mr. Akshay Jain Sukhani

... For the plaintiff.

Mr. Krishna Raj Thaker
Mr. Soumyajit Mishra

... For the defendant no. 1.

Mr. Ranjan Bachawat, Sr. Adv.
Mr. Rudraman Bhattacharyya
Mr. Sanjay Ginodia
Mr. Souvik Ganguly
Ms. Mini Agarwal

Ms. Ratnadipa Sarkar

Mr. Satwik Beriwal

... For the defendant no. 2.

Mr. Soumya Roy Chowdhury

Mr. Ritesh Ganguly

... For the defendant nos. 4, 6, 7, 8, 9 & 10.

Mr. Shaunak Mitra

Mr. Rahul Kumar Singh

... For the defendant nos. 11 and 13.

Hearing Concluded On : 24.07.2024

Judgment on : 11.09.2024

Krishna Rao, J.:

1. The plaintiff has filed the present application being G.A. No. 3 of 2022 in C.S. 140 of 2022 praying for withdrawal of the suit with liberty to file afresh. The defendant nos. 1, 2, 4, 6, 7, 8, 9, 10, 11 and 13 have raised objection for allowing the plaintiff to withdraw the suit with liberty to file afresh.
2. The plaintiff says that the plaintiff was not satisfied with the erstwhile advocate with the manner, the case was conducted and has changed her advocate and engaged the present advocate to conduct her case. The present advocate after going through the plaint found several formal defects in the plaint and also found that no relief for partition and consequential reliefs had been prayed for.

3. The present Counsel has informed the plaintiff about the said defects and advised for withdrawal of the suit and to file afresh.
4. The defendants have raised objection for allowing the plaintiff to withdraw the suit with the liberty to file afresh on the pretext that the plaintiff has not elaborately spelt out what are the formal defects. The defendants say that at the time of filing of the suit, the plaintiff has also obtained leave under Order II, Rule 2 of the CPC and the plaintiff can file a separate suit.
5. The defendants further say that the plaintiff has not pleaded in her application that the suit would fail if the plaintiff continued with the suit. The defendants say that it is settled law that liberty to file afresh is not a matter of course.
6. The plaintiff has filed the suit against the defendants praying for the following reliefs:

“a) A decree for perpetual injunction restraining the defendants and each of them from alienating, encumbering, dealing with or disposing of and/or creating any third party right or interest in the assets and properties of the Estate of Late Ballav Prasad Khemka, particulars whereof are set out in the Schedules A to D appended to the plaint, in any manner whatsoever;

b) A decree for perpetual injunction restraining the defendants and/or their men, agents, representatives and assigns from creating any third-party rights or interests in respect of the assets forming part of the Estate of Late Ballav Prasad Khemka without the consent of the plaintiff;

- c) *A decree for perpetual injunction restraining the defendants and each of them from claiming any right, title or interest in respect of the properties of the Estate of Late Ballav Prasad Khemka to the extent of the plaintiff's share;*
- d) *A decree for mandatory injunction directing the defendants and each of them to furnish true and faithful accounts with regard to the properties and assets of Late Ballav Prasad Khemka and their present status to the plaintiff;*
- e) *Interest and interest upon judgment;*
- f) *Judgment upon admission;*
- g) *Attachment before judgment;*
- h) *Injunction;*
- i) *Receiver;*
- j) *Costs;*
- k) *Such further and/or other reliefs;"*

7. The defendant no.1 is the mother of the plaintiff and the defendant nos. 2 and 3 are the brothers of the plaintiff. The defendant nos. 4 to 13 are companies owned by the father of the plaintiff Late Ballav Prasad Khemka.

8. Order XXIII, Rule 1(3) of the Code of Civil Procedure, 1908, reads as follows:

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

(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. If the plaint is read as a whole, one will find that actually the plaintiff has filed the suit for partition of the property left behind by her father in which she is also having her 1/4th share in the property left behind by her father and the defendant nos. 1, 2 and 3 are depriving her right over the said properties.
10. In the present application in paragraph 6 of the application, the plaintiff has described why the plaintiff intends to withdraw the suit with liberty to file afresh which reads as follows:

“6. The Learned Advocates presently engaged by the plaintiff duly went through the plaint and the case made out and arrived at the conclusion that the plaint suffered from several formal defects besides the fact that relief of partition and consequential reliefs had not been sought. The plaintiff was also advised that amendment to the plaint would involve restructuring and recasting of pleadings which would create unnecessary complexity and it was suggested that it would be better to withdraw the present suit and file the same afresh instead.”

11. The objection raised by the defendants that the plaintiff has not elaborately stated about the formal defects, the plaintiff has already obtained leave under Order II, Rule 2 of the Code of Civil Procedure,

1908 from this Court at the time of filing of the suit and the plaintiff has not pleaded that the suit filed by the plaintiff would fail.

12. Under Order XXIII, Rule 1(3) if the Court is satisfied that a suit must fail by a reason of some formal defect, or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of a claim, the plaintiff can be granted permission to withdraw the suit with the liberty to file afresh.
13. The plaintiff has relied upon the judgment in the case of **V. Rajendran and Another vs. Annasamy Pandian (Dead) through Lrs. Karthyayani Natchiar** reported in **(2017) 5 SCC 63** wherein the Hon'ble Supreme Court held that the principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action. The Hon'ble Court also relied upon the judgment of the Hon'ble Supreme Court in the case of **K.S. Bhoopathy and Others vs. Kokila and Others** reported in **(2000) 5 SCC 458** wherein the Hon'ble Court held that "Formal Defect" is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 of the CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action etc.
14. In the case of **Nurriazar Dorab Mehta & Ors. vs. The Assam Company Ltd.** reported in **2006 SCC OnLine Cal 155**, the Coordinate Bench of this Court held that while exercising discretion of this Court

under the provision of Order XXIII, Rule 1(3) of the CPC is to see whether there is any valuable right having been accrued by lapse of time or not. If no such right being accrued nor affected, the Court as a matter of course has power to allow the plaintiff to withdraw the suit to file afresh.

15. In the case of ***Madan Gopal Kanodia vs. Mamraj Maniram and Others*** reported in **(1977) 1 SCC 669**, the Hon'ble Supreme Court held that it is well settled that pleadings are loosely drafted in the courts, and the court should not scrutinise the pleadings with such meticulous care so as to result in genuine claims being defeated on trivial grounds.

16. Learned Counsel for the defendants have relied upon the following judgements:

- i. *K.S. Bhoopathy and Others vs. Kokila and Others*, reported in (2000) 5 SCC 458;
- ii. *Pundalik vs. Chandrabhan* reported in 1917 SCC OnLine MP 103;
- iii. *Baldeo Dass vs. Joshi Gauri Dutt and Others*, reported in 1952 SCC OnLine All 239;
- iv. *Haridas Sadhu Khan and Another vs. Giridhari Sadhu Khan and Another*, reported in 1933 SCC OnLine Cal 333;
- v. *Kiranmoyi Dasi and Others vs. Rama Nath Pal and Others*, reported in MANU/WB/0207/1921;

17. The plaintiff has filed the present case for partition of the property left behind by her father in which the plaintiff is claiming her 1/4th share.

In the prayer portion, the plaintiff has neither prayed for partition of the suit schedule property nor prayed for any preliminary decree or final decree. In the suit for partition, the plaintiff should first pray for declaration of share in preliminary form and after declaration of shares of the parties to the suit, final decree can be passed. In the present suit though the plaintiff has filed the suit for partition but no prayer for preliminary decree or final decree is prayed for.

- 18.** The plaintiff claims her 1/4th share of the property left behind by her father and there is a dispute between the plaintiff and the defendant nos. 1, 2 and 3 but the plaintiff has made the companies as party defendants in the suit as defendant nos. 4 to 13. The plaintiff can claim her share in the shares in the company but the plaintiff cannot claim the properties owned by the companies.
- 19.** This Court finds that the suit was presented before this Court on 10th June, 2022 and the same day, this Court granted leave to the plaintiff under Clause 12 of Letters Patent, 1865 and under Order II, Rule 2 of the CPC. After granting leave, this Court admitted that the plaint subject to scrutiny by the department. On 30th August, 2022, the plaintiff has filed the present application. Though the defendants have entered appearance in the suit but no written statement is filed.
- 20.** There is no law under which the plaintiff can be compelled to maintain a suit, rather she can be allowed to withdraw her suit but question whether leave should be granted to file afresh or not. Order XXIII Rule 1

clearly provides for withdrawal of the suit without leave. If such leave is not granted subsequently the plaintiff may be debarred from filing a fresh suit in relation to the same subject-matter. But Order XXIII, Rule 3 has protected the plaintiff in the event, she wishes to proceed further in relation to the same subject-matter.

- 21.** This Court finds that the plaint suffers from several formal defects and if the plaintiff is not allowed to withdraw the suit with the liberty to file afresh, the suit will fail as there is no prayer for partition and other consequential reliefs. There is a misjoinder of parties and the schedule of property is also not properly described. This Court also noticed that immediately after filing of the suit, the plaintiff has filed the present application and no written statement is filed by the defendants.
- 22.** This Court has gone through the judgments relied by the defendants and found that the facts of the present case is distinguishable from the facts of the each cases of the judgements referred by the defendants and thus this Court has not elaborately discussed the said judgments.
- 23.** In view of the above, the plaintiff is allowed to withdraw the suit being C.S. No. 140 of 2022 with the liberty to file afresh. **CS No. 140 of 2022** is **dismissed** as withdrawn with liberty to file afresh.
- 24. G.A. No. 3 of 2022** is **allowed**.

(Krishna Rao, J.)