

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL REVISION No.72 of 2023

1. Moti Kant Jha S/o Late Ramji Jha, Resident of Mauja-Mureth, Village-Narhi, P.O.-Narhi via Kaluahi, P.S.-Arer, District-Madhubani, Pin-847229.
2. Vijay Kant Jha, S/o Late Ramji Jha, Resident of Mauja-Mureth, Village-Narhi, P.O.-Narhi via Kaluahi, P.S.-Arer, District-Madhubani, Pin-847229.
3. Dev Krishan Jha, S/o Late Radha Kant Jha, Resident of Mauja-Mureth, Village-Narhi, P.O.-Narhi via Kaluahi, P.S.-Arer, District-Madhubani, Pin-847229.
4. Jay Krishan Jha, S/o Late Radha Kant Jha, Resident of Mauja-Mureth, Village-Narhi, P.O.-Narhi via Kaluahi, P.S.-Arer, District-Madhubani, Pin-847229.

... .. Petitioners

Versus

Kamal Das S/o Late Kari Das, Resident of Mauja-Mureth, Village-Narhi, P.O.-Narhi via Kaluahi, P.S.-Mareh, District-Madhubani, Pin-847229.

... .. Respondent

Appearance :

For the Petitioners	:	Mr. R.K.P. Singh, Advocate Mr. Bal Bhushan Choudhary, Advocate
For the Respondent	:	Mr. Anant Kumar Bhaskar, Advocate

**CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND
MALVIYA**

CAV ORDER

13 18-12-2025 This Civil Revision application is filed against order dated 05.12.2022 passed in the Title Suit No. 129 of 2019, CNR No. BRMB22-000168-2019 by the Learned Sub Ordinate Judge 1st Benipatti, Madhubani whereby and where under, withdrawal petition dated 23.09.2022 filed under Order XXIII Rule 1 of the Code of Civil Procedure (hereinafter refereed to as 'CPC') has been erroneously allowed with cost of Rs.7,500/- and permission has been granted to the plaintiff/opposite party to



withdraw the said title suit with liberty to file a fresh suit.

2. Heard learned counsel for the petitioners and learned counsel for the opposite party.

3. Learned counsel for the petitioners submits that as per provision mention under Order XXIII Rule 1 (3)(b) of the CPC, the sufficient ground for granting permission to institute a fresh suit, after withdrawal of the concerned suit, must be mentioned in the impugned order, but the learned Trial Court without mentioning the sufficient ground, granted permission to the present respondent to institute a fresh suit. He further submits that the impugned order is quite erroneous in law as well as on facts and fit to be set aside. The learned Trial Court has committed grave jurisdictional error in passing the impugned order which is highly prejudicial to the interest of the petitioner which if allowed to stand shall cause serious prejudice to the case of the petitioners. Therefore, the suit can not be permitted to be withdrawn with liberty to file fresh suit.

3.i. He further submits that the learned Trial Court has failed to consider and appreciate that the withdrawal petition was filed with sinister motive to circumvent the passing of injunction order against the plaintiff/opposite party. He further submits that formal defect which can not be cured by



amendment is a *sine qua non* for the maintainability of withdrawal petition specially for the withdrawal of the suit with liberty to file a fresh suit on the same cause of action. The plaintiff had not disclosed in his petition regarding the omissions/errors in the plaint, which were beyond rectification. The plaintiff/opposite party has only stated that there is formal defect in the plaint and has not provided any explanation regarding the nature of formal defect.

3.ii. In order to support his averment, he relies upon the judgement passed by the Co-ordinate Bench of this Hon'ble Court in *Ashok Kumar Choudhary v. Hindustan Petroleum Corporation Limited and Ors. 2006(4) PLJR-49* in which it has been held that:

“11. withdrawal is a right of a litigant but in certain circumstances withdrawal can not be permitted for simple reason where a party has taken advantage during the pendency of suit or by virtue of the suit pending, he cannot then be permitted to abandon the suit-but where plaintiff does not desire to proceed with the suit which has become infructuous by reason of relief having been granted by the concerned defendant itself, law cannot force him to proceed with the suit as plaintiff is the



master of the suit”.

Further he relies upon the judgment passed by the Co-ordinate Bench of this Hon’ble Court passed in ***Basudeb Narayan Singh and others v. Shesh Narayan Singh AIR 1979 PAT73.*** Additionally, in support of his submission, he relies upon the judgement passed by the Hon’ble Apex Court in ***V. Rajendran v. Annasamy Pandia (Died) Thr. Lrs*** reported in ***(2017) 5 SCC 63*** and also by the Hon’ble Bombay High Court in ***The Asian Assurance Co. Ltd. v. Madholal Sindhu And Ors.*** reported in ***AIR1950BOM378***, wherein essentially both the judgment laid down that “under Order XXIII Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a "formal defect" or “sufficient grounds”. The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to



prevent institution of suit again and again on the same cause of action”. He lastly submits that the impugned order is vexatious and fit to be set aside on the point that it is not fulfilling the mandatory rule of Order XXIII Rule 1 (3) of the CPC.

4. Learned counsel on the behalf of opposite party submits that the present civil revision is not maintainable in the eyes of law. He further submits that the plaintiff has a right to withdraw a suit at any stage under sub-rule (1) Rule 1 of Order XXIII of the CPC. He lastly submits that the impugned order has no infirmity or illegality and is legally tenable.

5. On perusal of materials available on record and as per the provision mention under Order XXIII Rule 1 sub-rule (3) of the CPC for withdrawal of the suit, it is evident to note that to withdraw the suit under Order XXIII Rule 1 of the CPC with liberty to institute a fresh suit on the same subject matter has to accompany with sufficient cause and reasonable ground. Order XXIII Rule 1(3) CPC lays down following grounds on which a Court may allow withdrawal of suit. It reads as under:

*"Rule. 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.

6. This court is of the opinion that the learned Trial Court has erred in allowing the present opposite party the liberty to file fresh suit without complying the mandatory provision of Order XXIII Rule 1 (3) of CPC. Moreover, the Hon'ble Apex Court in the case of ***K.S. Bhoopathy and others v. Kokila and others*** reported in **2000 (5) SCC 458** held that:

“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.

14. "In Bakhtawar Singh v. Sada Kaur the question of grant of permission under clause (3) of Order XXIII Rule 1 CPC was considered wherein it was held: (SCC Headnote) "In the present case all the courts below including the High Court concurrently found that the plaintiff-appellants failed to produce any evidence to show that the permission to withdraw the suit was given on the ground that the suit was bound to fail by reason of some formal defect or there were sufficient grounds for allowing the plaintiffs to institute a fresh suit in respect of the same subject-matter. The plaintiffs had not even produced the application which is said to have been filed for withdrawal of the earlier suit with permission to file a fresh suit on the same cause of action to show as to what was the formal defect in the earlier suit by reason of which it was sought to be withdrawn. In these facts and circumstances no case for fresh institution of suit on the same cause of action and for the same relief after the withdrawal of the earlier suit was made out by the plaintiff appellants, in accordance with the provisions of clause (3) of Order 23 Rule of the Code".

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 to use 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 f 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.

emphasis applied.

7. Further, it is the duty of the Court to be satisfied with the existence of formal “defect” or “sufficient cause” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Further, the plaintiff/opposite party has mentioned the formal defect in the plaint but had not specified any of them in the application before the learned Trial Court. In the present case, the learned Trial Court did not had any material on the record to satisfy itself about the nature of defect. Merely, on mentioning that there is a formal defect, the learned Trial Court allowed the withdrawal with the liberty to file the fresh case on the same cause of action.

8. So, considering all the materials available on record and in the aforesaid background, this Court, therefore, does find that the learned Trial Court has committed error while disposing off the withdrawal petition. Accordingly, the present Civil Revision is allowed, setting aside the impugned order to the extent of the liberty granted to the present respondent to file the



fresh suit on the same cause of action, passed by learned Sub-
Ordinate Judge 1st Benipatti, Madhubani in the Title Suit No.
129 of 2019.

(Ramesh Chand Malviya, J)

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