

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Order reserved on : 17.09.2025	Order pronounced on : 26.09.2025
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THE HONOURABLE MR JUSTICE P.B. BALAJI

CRP.No.984 of 2023
& CMP.No.7270 of 2023

Sabareesan

... Petitioner

Vs.

Periyasamy Padaiyatchi

... Respondent

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the order and decree dated 08.11.2022 in I.A.No.1 of 2019 in O.S.No.87 of 2010 on the file of the Additional District Munsif Court, Perambalur.

For Petitioner : Mr.R.Rajarajan

For Respondent : Mr.B.Eswaran
for M/s.Swaraj Associates

ORDER

The defendant in O.S.No.87 of 2010 on the file of the Additional District Munsif Court, Perambalur, challenges the liberty granted by the

Trial Court to the plaintiff to file a separate suit on the same cause of action, invoking Order XXIII Rule 1 of CPC.

2.I have heard Mr.R.Rajaraman, learned counsel for the petitioner and Mr.B.Eswaran, learned counsel for M/s.Swaraj Associate, for the respondent.

3.The learned counsel for the revision petitioner would firstly contend that the plaintiff, without even pointing out any formal defect in the plaint, had sought for liberty to file a fresh suit on the same cause of action, invoking Order XXIII Rule 1 of CPC. In this regard, he would take me through the plaint averments in the present suit and also the reasons assigned by the respondent/plaintiff for withdrawing the suit, with liberty to file a fresh suit on the same cause of action. He would further state that when the plaintiff has admitted that there was a partition already in paragraph No.5 of the plaint, there was no requirement for seeking the relief of partition, that too, by withdrawing the suit for declaration and filing a fresh suit on the same cause of action.

4.The learned counsel for the revision petitioner would also attack the findings of the Trial Court, granting liberty as sought for, as being misconceived, erroneous and contrary to the settled legal position. He would also rely on the decision of the Hon'ble Supreme Court in *K.S.Bhoopathy and others Vs. Kokila and others*, reported in (2000) 5 SCC 458 and also the decision of this Court in *Regina Vs. Ruby @ Rubavathy and another*, in *CRP(PD)(MD)No.2088 of 2023* dated 06.03.2024. He would therefore pray for the revision being allowed.

5.Per contra, the learned counsel for the respondent would state that the plaintiff was not advised properly in seeking appropriate relief and only on coming to know that the relief that has been sought for by the plaintiff would not actually give him any effective remedy, the present application has been taken out. He would also take me through the averments in the plaint and the necessity for framing the suit properly and effectively, in order to ultimately render justice to the plaintiff. It is also the contention of the learned counsel for the respondent that pursuant to the order granting

leave under Order XXIII Rule 1 of CPC, the respondent has also filed a fresh suit which is pending in O.S.No.78 of 2023 before the Additional District Munsif Court, Perambalur, and the revision petitioner has also been served with summons in the said suit. He would therefore contend that no interference is warranted with the well considered order of the Trial Court, granting leave. He would also place reliance on the decision of the this Court in *M.Sai and another Vs. Shree Dharmaraja Kovil Trust, Rep. by its Trustees Ekambara Chettiyar and others*, reported in 2018 3 L.W 156, in support of his contentions.

6.I have carefully considered the submissions advanced by the learned counsel on either side. I have gone through the records, including the order passed by the Trial Court, granting leave to the respondent to institute a fresh suit, on the same cause of action on which the present suit has been filed.

7.Originally, an extent of 2 acres and 99 cents was purchased under a registered sale deed by the respondent/plaintiff along with his sister, one

Pachaiyammal. Though there was no formal partition deed, it appears even from the reading of the plaint that the parties had, for the sake of convenience, divided the properties and the eastern side was being cultivated by the sister of the plaintiff and the western side portion was being cultivated by the respondent/plaintiff. There was a well which was in common enjoyment situate in between both the properties. It is the contention of the plaintiff that a new well was also dug and the plaintiff has contributed Rs.17,000/- for the same and electricity service connection was also obtained in the name of the plaintiff's sister, Pachaiyammal and it was used by both the plaintiff as well as the sister, Pachaiyammal, in common.

8.It is the case of the plaintiff that though the sister was entitled only to 1 acre and 49.5 cents, she executed a settlement deed in favour of the revision petitioner for an extent of 1 acre 57 cents on 18.11.2005 and thereby, had prevented the plaintiff from being entitled to water from both the wells. This is the crux of the dispute which led to filing of the present suit in O.S.No.33 of 2006. The suit has been filed only in respect of the excess 8 cents of land which has been unilaterally and incorrectly settled in favour of the revision petitioner.

9.It is also seen that there are two other suits filed touching the very same subject matter, one by the respondent in O.S.No.87 of 2010 and the petitioner in turn, has filed O.S.No.33 of 2006. According to the respondent, the relief that has been prayed in the present suit is insufficient as there has been no partition and unless the respondent seeks the relief of partition as well, he will not be in a position to enjoy the suit subject decree. It is only on this ground that the application was filed under Order XXIII Rule 1 of CPC.

10.Even in the affidavit filed in support of the application seeking leave, the respondent has only pointed out technical defects in the present suit and on that score, has sought the permission of the Court for filing a fresh suit on the same cause of action, including the relief of partition. The trial Court has found favour with the said request of the respondent and has allowed the said application. It is the contention of the revision petitioner/defendant that there is no formal defect that has been pointed out which alone can be the basis for grant of leave to withdraw the suit and file a fresh suit on the same cause of action.

11. In this connection, reliance has been placed on the decision of the Hon'ble Supreme Court, in *K.S. Bhoopathy's case* stated supra. Referring to the provisions of Order XXII Rule 1 of CPC, the Hon'ble Supreme Court held that though grant of leave envisaged in Sub-rule 3 of Rule 1 is at the discretion of the Court, such discretion is to be exercised with caution and circumspection and the Court should be satisfied that a suit would fail by reason of formal defect or that there are sufficient grounds for allowing the plaintiff to a fresh suit for the subject matter of the suit or part of the claim. The Hon'ble Supreme Court further held that the Court has to discharge the duty mandated under the provisions of the Code, taking into consideration all relevant aspects of the matter, including desirability of permitting the party to start a fresh round of litigation on the same cause of action, as, such grant of permission may also result in annulment of a right vested in the defendant or even a third party.

12. This Court in *Regina's case* stated supra, held that in order to obtain a relief under Rules 1 and 3 of Order XXIII of CPC, the plaintiff has

to satisfy that the suit must fail by reason of some formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter and that formal defect is a defect of form, prescribed by the rules of procedure and if the plaintiff is citing any formal defect, then the plaintiff must specifically mention and satisfy the Court, the existence of such formal defect, or other sufficient ground for permitting him to withdraw the suit, with liberty to file a fresh suit on the same cause of action, after curing the defect pointed out in the present suit. This Court, in the facts of the said case before it, finding that there was no sufficient reasons assigned/pointing out formal defects, held that the plaintiff was not entitled to leave under Order XXIII Rule 1 and 3 of CPC.

13. This Court, in *M.Sai's case*, states *supra*, referring to the decision of the Hon'ble Supreme Court in *K.S.Bhoopathy's case*, held that if the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, then the Court may permit the plaintiff to withdraw the suit and while interpreting the word "sufficient grounds", the Court has been given a wider discretion to allow withdrawal of the suit which is not

governed by clause (a), which relates only to formal defect and that even in the absence of any formal defect, if the plaintiff establishes sufficient grounds, then the Court is empowered to entertain an application under Order XXIII which relief cannot be done by way of amendments under Order VI Rule 17 of CPC.

14. The Trial Court has proceeded to allow the application considering that though the suit has been pending from 2010, trial has not commenced and no prejudice would be caused to the revision petitioner, if leave is granted as prayed for. The Trial Court has not even given a finding as to whether there has been any formal defect in the suit or whether the plaintiff has made out any other sufficient grounds for being entitled to leave to withdraw the suit, with liberty to file a fresh suit on the same cause of action. The duty is cast on the plaintiff under Order XXIII of the CPC to make out a case that there is either a formal defect which would entail failure of the suit or that there are other sufficient grounds to allow the plaintiff to institute a fresh suit. Sub-rule (3) itself starts with the 'satisfaction of the Court'. Therefore, it is incumbent for the Court to be

satisfied that either there is a formal defect or there are sufficient and satisfactory grounds to permit the withdrawal of the suit, with liberty to file a fresh suit, on the same cause of action.

15. As already discussed, the Trial court has not even given a finding in this regard and merely proceeds to allow the application, citing the reason that trial has not commenced and therefore no prejudice would be caused to the revision petitioner. Admittedly, there is no formal defect which entitles the plaintiff to seek permission to withdraw the suit and file a fresh suit on the same cause of action. The reason set out by the plaintiff seeking permission to withdraw the suit with liberty is not on the ground of any formal defect. The plaintiff has not set out any defect of form, that is prescribed by the rules of procedure, for example, improper valuation of the suit or confusion regarding identification of the suit properties, misjoinder of parties or failure to disclose the cause of action. Though there is no straight jacket formula for ascertaining what is a formal defect, in the light of the averments set out by the respondent in the application, I am able to see that there is no formal defect averred by the plaintiff. It is only his case

that the relief has not been moulded properly and a relief of partition ought to have been sought for and a mere relief of declaration as prayed would not be effective or sufficient to give full relief to the respondent.

16. In view of the mandate of clause (a) not being available, the only other ground on which liberty can be granted is when the plaintiff has made out sufficient grounds. The case of the plaintiff is that he was not advised properly and the relief of partition ought to have been sought for and mere declaratory relief is not going to be of any avail to the plaintiff. It is therefore to be seen that whether such a reason would fall within the phrase 'sufficient grounds' envisaged in Order XXIII Rule 1(3)(b) of CPC. Even in the plaint and also in the affidavit filed in support of the application seeking relief, the respondent has stated that subsequent to joint purchase, along with his sister, Pachaiyammal, the properties were orally divided into two equal halves, Pachaiyammal taking 1 acre and 49.5 cents in the eastern side and the plaintiff taking 1 acre 49.5 cents in the western side. Therefore, when the plaintiff has specifically pleaded about an oral partition having taken place and also having been given effect to, I do not find that the

plaintiff has made out sufficient ground for withdrawing the suit in order to enable the plaintiff to seek the relief of partition.

17.The Trial has unfortunately not discussed any of these aspects and has simply allowed the application, stating that no prejudice would be caused to the respondent. In fact, the Hon'ble Supreme Court frowned upon such an order being passed under Order XXIII Rule 1 of CPC in *K.S.Bhoopathy's case*, where the Hon'ble Supreme Court held that it is the duty of the Court to feel satisfied that there exists proper ground/reasons for granting permission for withdrawal of the suit with leave to file a fresh suit and that in such a matter, the statutory mandate is not complied with by merely stating that the grant of permission will not prejudice the defendant.

18.In the present case, the plaintiff having pleaded specifically about an oral partition, now cannot go back on the said plea and contend that there has been no partition and the property is undivided and therefore, the plaintiff should be given liberty to file a fresh suit, including the relief of partition. In such event, the right, which is accrued to the revision petitioner,

would be seriously prejudiced. In view of the above, I am satisfied that the petitioner has not made out sufficient grounds for being entitled to leave to withdraw the suit with liberty to file a fresh suit.

19. In fine, the Civil Revision Petition is allowed. The order dated 08.11.2022 in I.A.No.1 of 2019 in O.S.No.87 of 2010 on the file of the Additional District Munsif Court, Perambalur, is set aside. There shall be no order as to costs. Connected Civil Miscellaneous Petition is closed.

26.09.2025

Neutral Citation: Yes/No
Speaking Order/Non-speaking Order
Index : Yes / No

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To

The Additional District Munsif Court, Perambalur.

P.B. BALAJI,J.

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Pre-delivery order made in
CRP.No.984 of 2023
& CMP.No.7270 of 2023

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