

1
**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SHRI JUSTICE MILIND RAMESH PHADKE

ON THE 30th OF JUNE, 2023

MISC. PETITION No. 4948 of 2022

BETWEEN:-

1. SMT. KAPOORI BAI

2. RAMSWAROOP

3. KAMLA BAI

4. GANESHI BAI

5. RAJKUMARI

6. RUPESH S/O

7. RAJESH

8. SHIVANI

.....PETITIONER

(BY SHRI ANKIT SINGH RAJPUT - ADVOCATE)

AND

1. NEELESH

2. DEEPESH

3. GOVIND S

4. KHILAN

5. VISHESH

6. COLLECTOR VIDISHA (MADHYA PRADESH)

7. REKHA BAI

.....RESPONDENTS

(BY SHRI KALURAM KUSHWAHA - ADVOCATE FOR THE RESPONDENTS)

This petition coming on for admission this day, the court passed the following:

ORDER

1. The present petition under Article 227 of the Constitution of India has been filed against the order dated 1.9.2022 passed by Civil Judge Junior Division, Lateri, District Vidisha in R.C.S. No.23-A/2021, whereby an application under Order 23 Rule 1 of CPC filed on behalf of the present petitioners for withdrawal of the plaint was dismissed.

2. Brief facts of the case are that the predecessor-in-title of the present petitioners and other plaintiffs have filed a civil suit for declaration of title and

permanent injunction in respect of the Suit Property bearing Survey No.396 admeasuring 1.148 hectare against the respondents no.1 to 6/defendants. During the pendency of the suit, plaintiff no.7 Geeta Bai had expired on 5.6.2002 and learned Trial Court allowed the application under Order 22 Rule 3 as a legal representative of the deceased-plaintiff no.7 was already on record. The present petitioner/plaintiff no.1 to 3 and 5 and 8 to 10 moved an application under Order 23 Rule 1 of CPC, likewise petitioner/plaintiff no.4 also moved a similar application on 17.8.2022 before the learned Trial Court seeking permission to withdraw the plaint on the ground of plaintiff no.6 Rekha Bai had obtained their signatures without their consent and knowledge and thus the plaintiff no.1 to 5 and 7 to 10 are not willing to contest the suit against the defendants and thus, prayed for withdrawal of the suit.

3. The present respondents no.1 to 6/defendants did not filed any reply to the application, however, respondent no.7/plaintiff no.6 filed objections and prayed for dismissal of the said application. The learned Trial Court vide impugned order dated 1.9.2022 dismissed the application filed by the petitioner. Being aggrieved by the aforesaid the present petition has been preferred.

4. Learned counsel for the petitioner has vehemently argued that the impugned order dated 1.9.2022 passed by the learned Court is perse illegal and without jurisdiction, therefore, deserves to be set aside. It was further argued that learned Trial Court has failed to appreciate the fact that application under Order 23 Rule 1 of CPC is filed by all the plaintiff except plaintiff no.6 on the ground for defrauding them their signatures have been taken and therefore, they do not wish to continue with the suit. But ignoring this aspect the said application was dismissed which is not sustainable. It was also

argued that the learned Trial Court has not appreciated the fact that when one of the several plaintiff desired to withdraw the suit without reserving liberty to institute a fresh suit in respect of the same subject matter the consent of the co-plaintiff is not required and the provisions of sub-rule (5) of Rule 1 of Order 23 will not have any application in that case. To bolster his submission reliance was placed in the matter in the case of Mihir Kumar Talukdar vs. Pradip Kumar Sengupta and others, AIR 2011 (Calcutta) 211.

5. Per contra the learned counsel for the respondent no.7/plaintiff no.6 contended that there is no illegality committed by the learned Trial Court in rejecting the application as under the provisions of Order 23 Rule 1 of CPC itself mandatorily required for the co-plaintiff to obtain the permission from the other plaintiff for withdrawal from the suit and since the consent of all the plaintiffs have not been obtained, therefore, the present petitioners could not have been allowed to withdraw from the suit. While placing reliance on sub-rule (5) of Rule 1 of Order 23 it was contended that Court is not authorized to permit one of the several plaintiffs to abandon a suit or part of a claim under sub-rule (1) or to withdraw, under sub-rule (3) any suit or part of a claim, without the consent of the other plaintiffs and when there is statutory impediment in allowing a plaintiff withdrawing from the suit, the Trial Court has rightly rejected the application. Thus it was contended that the present petition is devoid of any substance and deserves to be dismissed.

6. Heard the counsel for the parties and perused the record.

7. Order 23 of the CPC governs the rules pertaining to the withdrawal of a suit by a plaintiff. As per Order 23, Rule 1(1) of the CPC, a plaintiff may abandon his suit or abandon a part of his claim at any time after the institution

of a suit. As soon as an application is filed under this sub-rule, the withdrawal of the suit is complete and such withdrawal is not dependent on the court's order. The court's permission is only required in case the plaintiff desires to institute a fresh suit for the same cause of action.

8. In cases where from more than one plaintiff Rule 1(5) of Order 23 of the CPC provides that in case of multiple plaintiffs, any single plaintiff shall not be allowed to abandon the suit or part of his claim without the consent of the other plaintiffs. Order 23 Rule 1 (5) reads as under:

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

9. This matter at the earlier point of time was examined by the Calcutta High Court in the matter of Baidyanath Nandi Vs. Shyama Sundar Nandi, reported in AIR 1943 Cal 427 and the question that arose in the aforesaid matter was whether a plaintiff required the consent of other co-plaintiff withdrawing from the suit, if such plaintiff did not want any liberty to institute a fresh suit, it was held that when one of several plaintiffs desires to withdraw from the suit without reserving a liberty to institute a fresh suit in respect of the same matter, the consent of the co-plaintiff is not necessary.

10. The Division Bench in the case of Baidyanath Nandi (supra) also referred to Order 23 Rule 1 CPC and laid that (a) when the cause of action is vested jointly in all the co-plaintiffs; in such a scenario withdrawal from the suit by one co-plaintiff should be prejudiced from the other co-plaintiff, therefore, it was held that the co-plaintiff will not be allowed to withdraw from the suit

without the consent of the co-plaintiff. In such scenario the High Court of Calcutta therein had opined that in such cases the co-plaintiffs who withdraw from the suit could be made a proforma defendant so that suit does not fail as a result of defect of the party. (b) when the cause of action of withdrawing plaintiff is separate from the other co-plaintiffs; in this scenario it was held that as co-plaintiff desiring to withdraw from a suit is having a separate cause of action, such co-plaintiff can always be allowed to withdraw without the consent of the other plaintiffs. As such the withdrawal will not effect the rights of co-plaintiff.

11. This question was again revisited by the High Court of Calcutta in the case of **Mihir Kumar Talukdar vs Pradip Kumar Sengupta & Ors, AIR 2011 Calcutta 211**, wherein it was observed that on the decision on the issue of applicability of Order 23 Rule 1(5) of CPC would necessitate a close examination of the bundle of facts pleaded in the plaint giving rise to the plaintiffs' actionable claim and the relief that they seek therein. In that context it was held that if the plaintiff who wishes to withdraw from the suit, as he has a separate cause of action from the other co-plaintiffs and if such withdrawal has no adverse affect the consent of other co-plaintiff will not be required for such withdrawal.

12. If the facts of the present case are put to test on the above factual matrix then it would be observed that the present petitioner/plaintiff along with respondent no.7 had filed a suit for declaration, injunction and for cancellation of registered Will in favour of present respondents no.1 to 3/defendants and as such they are claiming their individual 1/8th right in the property and the relief claimed by the plaintiffs are severable and in that event as the reliefs claimed are severable in the sense that abandonment of relief

claimed by one plaintiff would not affect in any manner the right of the other plaintiff to relief on establishment of the plaint case, there is no reason as to why the plaintiff seeking to abandon his claim in the suit, or withdraw from the suit without asking for permission of the Court to file a fresh suit, should be made to continue lending his or her name in the proceedings as plaintiff or as a transposed defendant only because the co-plaintiff does not consent to such abandonment of the claim or withdrawal from the suit without any justification therefor.

13. Therefore, if one of several plaintiffs having independent right to relief and which is severable from the right claimed by the other plaintiff(s) seeks to abandon his claim in the suit once and for all without reservation and such abandonment does not affect the right to relief of the co-plaintiff(s), his/her consent would not be a sine qua non and the learned Court may, in its discretion, can grant the prayer made before it on such terms as it considers just and proper supported with reasons. Such an interpretation is intended to 'iron out the creases' and not alteration of the material of which the Code is woven.

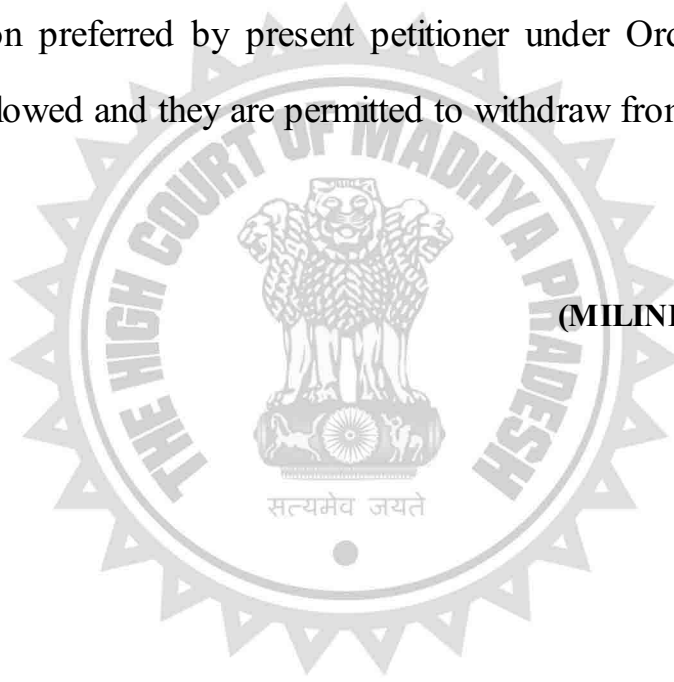
13. Turning to the case in hand the petitioner herein and if the present respondent no.7/plaintiff would have claimed right and title over the entire suit land instead of their individual shares then it could have been presumed that there was only one cause of action and in that case withdrawal of the petitioner from the suit could have been detrimental to the interest of the present respondent no.7 and in such case the Court would have been justified in refusing the permission to withdraw without consent of the other co-plaintiff.

14. However, it appears from the plaint that each plaintiff has an

individual and equal share in the property and since all the plaintiffs have independent but identical rights to sue had joined in one suit because that was permissible in terms of Order 1 Rule 1 CPC and effect of granting permission to the petitioner to withdraw from the suit would be that the parties i.e. the opposite party herein would be left in the same position which had occurred on the date of filing of the suit, the permission to the Petitioner to withdraw from the suit should have been granted.

15. In the light of the aforesaid discussion this Court finds that the order impugned herein cannot be sustained. Accordingly it is hereby set aside. The application preferred by present petitioner under Order 23 Rule 1 CPC is hereby allowed and they are permitted to withdraw from the suit.

Pawar



(MILIND RAMESH PHADKE)
JUDGE