

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 05TH DAY OF OCTOBER 2020 / 13TH ASWINA, 1942

OP(C).No.123 OF 2020

PETITIONER:

SABU ISSAC,
AGED ABOUT 54 YEARS
S/O. ISSAC, MANGALASSERY KARUMANCHERY HOUSE,
KAINAKARY P.O., ALAPPUZHA, PIN-688501.

BY ADVS.
SRI.MATHEW JOHN (K)
SRI.MATHEW DEVASSI
SRI.ABY J AUGUSTINE

RESPONDENT:

ANTONY CHACKO,
AGED 61 YEARS
S/O. CHACKO ANTONY, FROM KOITHARA PUTHANPURA,
KAINAKARY NOW HAVING RESIDENCE AT HOUSE NO.32/1973,
WORKING ABROAD IN USA, REPRESENTED BY POWER OF
ATTORNEY HOLDER ANSAMMA P. THOMAS, PIN-682017.

R1 BY ADV. SRI.K.V.SADANANDA PRABHU

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 08-09-2020,
ALONG WITH OP(C).173/2020, THE COURT ON 05-10-2020 DELIVERED THE
FOLLOWING:

O.P. (C) Nos.123/2020
and
173/2020

2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

MONDAY, THE 05TH DAY OF OCTOBER 2020 / 13TH ASWINA, 1942

OP(C).No.173 OF 2020

PETITIONER:

SABU ISSAC
AGED ABOUT 54 YEARS
S/O. ISSAC, MANGALASSERY KARUMANCHERY HOUSE,
KAINAKARY P.O. ALAPPUZHA 688 501.

BY ADVS.
SRI.MATHEW JOHN (K)
SRI.MATHEW DEVASSI
SRI.ABY J AUGUSTINE

RESPONDENT:

ANTONY CHACKO, AGED 61 YEARS
S/O. CHACKO ANTONY FROM KOITHARA PUTHENPURA,
KAINAKARY NOW HAVING RESIDENT AT HOUSE NO.
32/1973 J.M. HOMES, A11 NETHAJI ROAD,
PALARIVATTOM WORKING ABROAD IN USA ,
REPRESENTED BY POWER OF ATTORNEY HOLDER ANSAMMA
P. THOMAS, PIN - 682 017.

THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 08-09-2020, ALONG WITH OP(C).123/2020, THE COURT ON 05-10-2020 DELIVERED THE FOLLOWING:

O.P. (C) Nos.123/2020
and
173/2020

3

"CR"

R.NARAYANA PISHARADI, J

O.P(C) No.123 of 2020
and
173 of 2020

Dated this the 5th day of October, 2020

J U D G M E N T

An order passed by the first appellate court, granting permission to the plaintiff to withdraw the two suits instituted by him with liberty to file fresh suit/suits on the same subject matter, is under challenge in these original petitions.

2. The petitioner is the first defendant in the suit O.S.No.266/2011 and the sole defendant in the suit O.S.No.9/2015 on the file of the Sub Court, Alappuzha. The respondent herein is the plaintiff in these two suits.

3. The second defendant in the suit O.S.No.266/2011 is not a party to these original petitions. However, for the sake of

O.P. (C) Nos.123/2020
and
173/2020

4

convenience, the parties shall be hereinafter referred to as 'the plaintiff' and 'the defendant'.

4. The plaintiff had instituted the suit O.S.No.266/2011 in the Sub Court, Alappuzha for granting a decree for cancellation of sale deed No.2930/2008 of S.R.O Pulinkunnu which was executed by the second defendant in favour of the first defendant. The decree for cancellation of that document was sought by the plaintiff on the ground that the second defendant had no property in survey No.60/1 which was mentioned in that document. The plaintiff had not raised any plea in this suit that he had any right, title or interest in the property covered by the aforesaid document. The suit was instituted on the basis that the plaintiff entertained an apprehension that the defendants may, in future, raise claim over the property of the plaintiff which lies adjacent to the property in survey No.60/1.

5. The defendant filed written statement in the suit O.S.No.266/2011 contending that the suit is not maintainable and that the plaintiff has got no property in the vicinity of the property covered by sale deed No.2930/2008.

O.P. (C) Nos.123/2020
and
173/2020

5

6. Even before the institution of the suit O.S.No.266/2011, the father of the plaintiff had instituted the suit O.S.No.124/2009 in the Munsiff's Court, Alappuzha against the defendant for granting a decree of prohibitory injunction restraining the defendant from trespassing into the property shown in the plaint schedule and committing any waste therein. The allegation in this suit was that the defendant made attempt to trespass upon the plaint schedule property. The father of the plaintiff subsequently died and the plaintiff was impleaded in this suit.

7. The defendant filed written statement in the suit O.S.No.124/2009 contending that the description of the property mentioned in that suit is not correct and it includes 5.89 Ares of land covered by document No.2930/2008.

8. The suit O.S.No.124/2009 was transferred to the Sub Court, Alappuzha and it was renumbered as O.S.No.9/2015.

9. The trial court conducted joint trial of the two suits. The trial court found that the plaintiff, who was not a party to document No.2930/08, had no right to seek cancellation of that

O.P. (C) Nos.123/2020
and
173/2020

6

document and dismissed the suit O.S.No.266/2011. The trial court also dismissed the suit O.S.No.9/2015 on the basis of the finding that the plaintiff failed to prove possession over the property mentioned in that suit.

10. The plaintiff filed the appeal A.S.No.127/2016 challenging the decree and judgment passed against him in the suit O.S.No.266/2011. He also filed the appeal A.S.No.126/2016 challenging the decree and judgment passed against him in the suit O.S.No.9/2015.

11. The plaintiff filed an application as I.A.No.895/2019 in A.S.No.126/2016 and another application as I.A.No.896/2019 in A.S.No.127/2016 under Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908 (for short 'the Code') praying that he may be permitted to withdraw from the two suits with liberty to sue the defendant/defendants afresh on the same subject matter. These applications were filed by the plaintiff on the plea that his counsel opined that there was so many defects in the framing of the suits and that the proper remedy ought to have been to file a suit for declaration of title of the disputed property and recovery of

O.P. (C) Nos.123/2020
and
173/2020

7

possession.

12. The defendant filed objection to the abovementioned two applications, contending that the applications are not maintainable and that there is no sufficient ground to grant permission to the plaintiff to withdraw from the suits with liberty to file fresh suits on the subject matter.

13. The appellate court, by separate orders, allowed the applications I.A.No.895/2019 and I.A.No.896/2019, stating as follows:

"18. Here, the power of attorney of the appellant swears that, their advocate after studying the case opined that, if appeal have proceeded with, it may also end in dismissal because there were many defects in framing of the suit itself. While so, the proper remedy is to file a suit for declaration of title in respect of the deed No.2930/2008 executed by the second defendant in favour of the first defendant. It is also highly necessary that, prayer for recovery of possession is also to be included in the new suit.

19. Therefore, this court on a careful evaluation of the entire facts and circumstances, satisfied sufficient reasons in permitting appellant to

withdraw the suit for filing a fresh one as prayed on the basis of the same subject matter. However, maintainability of the suit is not guaranteed by mere grant of permission.”

14. The defendant has challenged the legality and propriety of the aforesaid orders in these original petitions filed under Article 227 of the Constitution of India.

15. Heard learned counsel for both parties.

16. Learned counsel for the petitioner contended that the appellate court has not considered whether the applications filed by the plaintiff for withdrawal from the suits could be allowed at the appellate stage. Learned counsel has contended that granting permission to withdraw a suit at the appellate stage with liberty to file fresh suit on the same subject matter would deprive the defendant of the rights and advantages obtained by him under the decree passed in the suit and therefore, the appellate court should not have allowed the applications filed by the plaintiff.

17. *Per contra*, learned counsel for the respondent has contended that the defendant has not obtained any vested right or advantage under the decree passed in the two suits and that

the defendant is not deprived of any such right by the order passed by the appellate court granting permission to the plaintiff to withdraw from the suits with liberty to file fresh suit for appropriate reliefs.

18. Order XXIII Rule 1(1) of the Code provides that, at any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim.

19. Order XXIII Rule 1(3) of the Code states that, 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.

20. The plaintiff can abandon a suit or a part of his claim as a matter of right without the permission of the court. The plaintiff

O.P. (C) Nos.123/2020
and
173/2020

10

need not obtain any permission from the Court to abandon the suit. He has right to file an application to abandon his suit or part thereof at any time after its filing. In such a case, he will be precluded from suing again on the same cause of action. A defendant cannot compel the plaintiff to proceed with the suit. When the plaintiff files an application under sub-rule (1) of Rule 1 of Order XXIII of the Code and prays for permission to withdraw the suit, whether in full or part, he is always at liberty to do so and in such case, the defendant has no right to raise any objection to such prayer being made by the plaintiff except to ask for payment of costs. The reason is that while making a prayer to withdraw the suit under sub-rule (1) of Rule 1 of Order XXIII of the Code, the plaintiff does not ask for any leave to file a fresh suit on the same subject matter. A mere withdrawal of the suit, without asking anything more, can always be permitted. But, if the plaintiff wants to withdraw from the suit and institute a fresh suit on the same subject matter, he has to seek and obtain permission from the court (See **Anil Kumar Singh v. Vijay Pal Singh : AIR 2017 SC 5587**). The plaintiff cannot, while

abandoning a suit or abandoning a part of his claim, reserve to himself the right to bring a fresh suit on the same cause of action (See **Rathinavel Chettiar v. Sivaraman : (1999) 4 SCC 89**).

21. A bare perusal of the provision contained in Order XXIII Rule 1(3) of the Code would show that, the plaintiff can seek permission to withdraw from the suit with liberty to file a fresh suit in respect of the same subject matter of the suit, on any of the two grounds: (1) The suit would fail by reason of some formal defect. (2) There are sufficient grounds for allowing the plaintiff to institute a fresh suit in respect of the subject matter of the suit. The Court can allow the application filed under Order XXIII Rule 1(3) of the Code for withdrawal of the suit with liberty to bring a fresh suit only on satisfaction of the condition in either of the Clauses (a) or (b), that is, existence of a "formal defect" or "sufficient grounds".

22. The principle underlying Rule 1 of Order XXIII of the Code is that when a plaintiff once institutes a suit in a court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject

matter again after abandoning the earlier suit or by withdrawing it without the permission of the court to file a fresh suit. The law confers upon a man no right or benefit which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the court by instituting suit again and again on the same cause of action without any good reason, the Code insists that he should obtain the permission of the court to file a fresh suit after establishing either of the two grounds mentioned in sub-rule (3) of Rule 1 of Order XXIII of the Code. The principle underlying the above rule is founded on public policy (See **Sarguja Transport Service v. State Transport Appellate Tribunal : AIR 1987 SC 88**).

23. "Formal defect" is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 of the Code, improper valuation of the suit, insufficient court-fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc. In order to constitute a ground for making an application for withdrawing from the suit with liberty to file fresh suit on the same subject

matter, it is not sufficient to show that there is some formal defect in the suit but it is also necessary to show that the suit would fail on account of such formal defect.

24. The question arises whether "sufficient grounds" mentioned in clause (b) of sub-rule (3) of Rule 1 of Order XXIII of the Code shall be interpreted to mean grounds analogous to a formal defect or not. In **Rajendran v. Annasamy Pandian (AIR 2017 SC 685)**, the Supreme Court noticed the two views in this regard but did not elaborate on this aspect because it did not fall for consideration in that case.

25. The true scope of the rule of "ejusdem generis" is that words of a general nature following specific and particular words should be construed as limited to things which are of the same nature as those specified (See **U.P.State Electricity Board v. Hari Shanker Jain : AIR 1979 SC 65**). To invoke the application of the ejusdem generis rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the

rule cannot apply (See **Rajsthan State Electrcity Board v. Mohan Lal : AIR 1967 SC 1857**).

26. In **Prabhavathi v. Kunhathabi Umma : 1981 KLT 438**, this Court held that, the ejusdem generis rule cannot be applied in construing the expression "sufficient grounds" in clause (b) of sub-rule (3) of Rule 1 of Order XXIII of the Code. This Court stated as follows:

"Having thus dealt with one class of suits where permission to withdraw could be granted by a court, Clause (b) proceeds to deal with other circumstances or cases where also leave can be granted. On simple reading, what Clause (b) appears to lay down is that where the court is satisfied that there are sufficient grounds for allowing a plaintiff to institute a fresh suit, it may grant him permission to withdraw the pending suit. The essential distinction between Clause (a) and Clause (b) is that while the former deals with a class of suits i.e. suits which must fail by reason of formal defect, the latter does not conceive of any such limited class at all. Plainly read, Clause (b) permits a court to allow withdrawal of any suit when "sufficient grounds" to its satisfaction are made out. While satisfaction of the court that the

suit must fail by reason of a formal defect is a condition for invoking Clause (a), there is no such condition in Clause (b). The result of holding that "sufficient grounds" in Clause (b) must refer to grounds analogous to 'formal defects' will be to restrict its operation to another class of cases just outside the periphery of Clause (a). But there is nothing in the plain language of Clause (b) to suggest that the legislature was thinking of any specific class for its application. It is possible to construe the scope of, the clause without the aid of any rule of construction, where a suit must necessarily fail by reason of some formal defect, the court can allow its withdrawal under Clause (a); and in all other cases where a plaintiff is able to make out that there are sufficient grounds for withdrawal, the court can act under Clause (b)".

(emphasis supplied)

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

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. The applications for withdrawal of the suits were filed by the plaintiff at the appellate stage. An appeal is a continuation of the suit and the power under Order XXIII Rule 1(3) of the Code can be exercised by the appellate court to grant permission to withdraw the suit with liberty to file a fresh suit (See **Amminikutty v. George Abraham : 1987 (1) KLT 574** and **Choice School v. Salim : 2008 (1) KHC 526 : 2008 (2) KLT 350**).

29. However, when an application for withdrawal of suit is filed at the appellate stage, the court has to take into consideration some other matters also. In **Bhoopathy v. Kokila : AIR 2000 SC 2132**, the Supreme Court has held as follows:

"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 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 23 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 23 Rule 1(3) C.P.C 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. 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 supplied).

30. In **Rathinavel Chettiar** (supra), the Supreme Court has held as follows:

“Since withdrawal of suit at the appellate stage, if allowed, would have the effect of destroying or nullifying the decree affecting thereby rights of the parties which came to be vested under the decree, it cannot be allowed as a matter of course but has to be allowed rarely only when a strong case is made out. Where a decree passed by the Trial Court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to

destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody's vested rights".

31. In **Vidhydhar Dube v. Har Charan : AIR 1971 All 41**, it has been held as follows:

"A plaintiff has a right to continue or withdraw a suit till a decree comes into existence. Once the court makes a final adjudication and passes a decree, certain rights become vested in the party in whose favour the decree is made. Where the suit is dismissed, certain rights become vested in the defendants inasmuch as the findings given in the judgment become binding on the parties and operate as res judicata in subsequent litigation between the parties. The right of a plaintiff to withdraw the suit at the appellate stage thus becomes subject to the rights acquired by the defendants under the decree and ceases to be an absolute right. The appellate court may permit the plaintiff to withdraw the suit when by such withdrawal no vested or substantive right of the defendant is to be adversely affected but the plaintiff may not be permitted to withdraw the suit at the appellate stage if it results in

depriving the defendant of some vested or substantive right”.

32. The principles stated above in the decision in **Vidhydhar Dube** (supra) stand approved by the Apex Court in **Rathinavel Chettiar** (supra).

33. In **Sneh Gupta v. Devi Sarup : (2009) 6 SCC 194**, it is stated as follows:

“A permission to withdraw the suit could have been given only with notice to the respondents who had become entitled to some interest in the property by reason of a judgment and decree passed in the suit. The Court for the purpose of allowing withdrawal of a suit after passing the decree, viz., at the appellate stage, is required to consider this aspect of the matter”.

(emphasis supplied).

34. Therefore, it is now well-settled that there is restriction on the right to withdraw from the suit at the appellate stage. The plaintiff has no absolute right, at the appellate stage, to withdraw from the suit. An application made at the appellate stage to withdraw the suit cannot be allowed by the court if

granting such permission would have the effect of depriving or destroying or nullifying or annulling any right which has come to be vested with the defendant under the decree. The court shall keep in mind the fact that, when permission is granted to withdraw from the suit with liberty to file a fresh suit, the parties are placed in the same position as they would have been, had the suit not been instituted at all.

35. In the instant case, while granting permission to the plaintiff to withdraw from the suits, the appellate court has not considered whether any right had accrued in favour of the defendant by the dismissal of the suits by the trial court and by granting permission to withdraw from the suits, whether the defendant would be deprived of any such right. Even a decree dismissing the suit may create right in favour of the defendant (See **Mary Teacher v. Varghese : 2017(1) KHC 830 : 2017(1) KLT 840**). The appellate court has considered the applications filed by the plaintiff as if they were filed at the trial stage. There is also no clarity in the impugned orders passed by the appellate court as to whether it was on any ground under

O.P. (C) Nos.123/2020
and
173/2020

22

clause (a) or clause (b) of Rule 1(3) of Order XXIII the permission to withdraw from the suit was granted. In such circumstances, it has become necessary to remand the matter to the appellate court for fresh consideration of the applications filed by the plaintiff.

36. Consequently, the original petitions are allowed. The impugned orders (Ext.P4 in both original petitions) passed by the court below are set aside. The applications I.A.No.895/2019 in A.S.No.126/2016 and I.A.No.896/2019 in A.S.No.127/2016 are remanded to the appellate court for fresh consideration and disposal in the light of the principles stated in the decisions of the Apex Court in **Bhoopathy** (supra) and **Rathinavel Chettiar** (supra) which have been referred to in this judgment.

(sd/-)

R.NARAYANA PISHARADI, JUDGE

jsr

O.P. (C) Nos.123/2020
and
173/2020

23

APPENDIX OF OP(C) 123/2020

PETITIONER'S EXHIBITS:

EXHIBIT P1 A TRUE COPY OF THE JUDGMENT IN OS
NO.266/2011 AND 9/2015 ON THE FILE OF
THE SUB COURT, ALAPPUZHA.

EXHIBIT P2 A TRUE COPY OF THE APPLICATION TO
WITHDRAW A.S. NO.126/2016.

EXHIBIT P3 A TRUE COPY OF THE OBJECTION FILED IN
AS NO.126/16.

EXHIBIT P4 A TRUE COPY OF THE ORDER IN IA
NO.895/19 IN AS NO.126/16.

RESPONDENT'S EXHIBITS : NIL

TRUE COPY

PS TO JUDGE

O.P. (C) Nos.123/2020
and
173/2020

24

APPENDIX OF OP(C) 173/2020

PETITIONER'S EXHIBITS:

EXHIBIT P1 **TRUE COPY OF THE JUDGMENT IN O.S. NO. 266/2011 & 9/2015 ON THE FILE OF THE SUB COURT, ALAPPUZHA.**

EXHIBIT P2 **TRUE COPY OF THE APPLICATION TO WITHDRAW A.S. NO. 127/16.**

EXHIBIT P3 **TRUE COPY OF THE OBJECTION FILED IN A.S. NO. 127/16.**

EXHIBIT P4 **TRUE COPY OF THE ORDER IN I.A. NO. 896/19 IN A.S. NO. 127/16.**

RESPONDENT'S EXHIBITS : NIL

TRUE COPY

PS TO JUDGE