

**IN THE HIGH COURT OF JAMMU & KASHMIR AND
LADAKH AT SRINAGAR**

Reserved on: 06.05.2025
Pronounced on: 16.05.2025

CM(M) No.96/2024

MANZOOR AHMAD WANI **...PETITIONER(S)**

Through: - Mr. Aswad Attar, Advocate.

Vs.

AYAZ AHMAD RAINA & ANOTHER **...RESPONDENT(S)**

Through: - Mr. Rizwan-ul-Zaman, Advocate.

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1) The petitioner, through the medium of present petition, has challenged order dated 22.12.2023 passed by the learned Sub Judge, Vailoo (hereinafter referred to as "the trial court"), whereby application of respondent No.1 seeking withdrawal of the suit with permission to file fresh suit on the same cause of action in terms of Order 23 Rule 1 CPC, has been allowed. Challenge has also been thrown to subsequent suit filed by respondent No.1 against the petitioner and proforma respondent, which is stated to be pending before the trial court.

2) It appears that respondent No.1 (hereinafter referred to as "the plaintiff" filed a suit for permanent prohibitory injunction against the petitioner (hereinafter referred to as

“the defendant”) before the trial court for restraining him from making any interference with his peaceful possession of a patch of land comprised in Survey No.3063/1725 situated at Vailoo. It was pleaded by the plaintiff that in the year 2010, the defendant had provided him the suit land which is adjacent to the shops that have been taken on rent by the plaintiff. The suit land was provided to the plaintiff for the purpose of construction of service station for 9+washing vehicles. It was claimed by the plaintiff that initially the suit land was leased out by the defendant to him but later on he received sale consideration of Rs.50,000/ from the plaintiff and agreed to transfer the ownership of the said land in his favour.

3) It was further pleaded that the plaintiff has incurred expenses of about Rs.15.00 lacs for construction and maintenance of suit property and he has been paying the electricity and water charges for running his car workshop from the suit land. It was alleged by the plaintiff that the defendant is trying to demolish the existing structure and is trying to interfere in his peaceful possession of the suit property by excavating the adjacent land to the detriment of the plaintiff.

4) It seems that the defendant filed his written statement, in which he admitted that he had handed over

possession of the suit land to the plaintiff but he claimed that the same was done on the licence basis and licence fee of Rs.24,000/ per annum was fixed. It was pleaded by the defendant that he requires the suit property for his own use and, therefore, he approached the plaintiff to hand over the possession of the property in question to him. It was contended by the defendant that adjacent to the suit property, he is raising construction on his own land after obtaining NOC and permission from the concerned authorities and that he is not raising any construction on the suit land. It was further pleaded by the defendant that under the garb of the suit, the plaintiff is seeking declaration with regard to his ownership on the ground that he has purchased the suit land, as such, the suit is not maintainable.

5) After filing of written statement by the defendant, the learned trial court fixed the case for recording of preliminary statements of the parties. At this stage the plaintiff filed an application under Order 23 Rule 1 CPC seeking withdrawal of the suit with a prayer for permission to file a fresh suit on same cause of action. In the application it was pleaded that due to certain omissions in the statement of facts and some other inadvertent mistakes of legal and technical nature including factual as well,

which may damage the case of the plaintiff, it is necessary and expedient to file a properly drafted fresh suit. It was further pleaded that due to technical defect on record, the plaintiff desires to withdraw the suit with permission to file a fresh one on the same cause of action. It was mentioned in the application that the plaintiff had narrated the facts to his counsel but the counsel has not mentioned the exact facts in the plaint and in case the plaintiff is not permitted to file a fresh suit after withdrawal of the suit, he would suffer an irreparable loss.

6) The defendant contested the aforesaid application by filing his reply. In the reply, it was submitted that the plaintiff was supposed to mention and explain each and every defect on account of which his suit would fail and because the same has not been done by the plaintiff, the application deserves to be dismissed. It was further contended that it has not been mentioned in the application as to with which technical and formal defect the suit of the plaintiff is suffering. Thus, according to the defendant because the exact details are not mentioned in the application, as such, the same is liable to be dismissed.

7) The learned trial court vide order impugned dated 22.12.2023 allowed the application of the plaintiff filed under Order 23 Rule 1 CPC and permitted him to withdraw

the suit and to file a fresh suit on the same cause of action. While allowing the application, the learned trial court observed that because proper relief in the suit has not been sought by the plaintiff, as such, the same is suffering from formal defect which may result in failure of suit of the plaintiff.

8) It is pertinent to mention here that after withdrawal of the suit; the plaintiff filed another suit before the learned trial court against the defendant and proforma respondent. In the said suit, it was pleaded that the defendant had agreed to sell the suit land measuring 36 feet in length and breadth upto boundary wall of forest land for a sale consideration of Rs.80,000/, out of which Rs.50,000/ were paid as earnest money by the plaintiff to the defendant, regarding which an agreement came to be executed between the parties on 6th July, 2011. A copy of the said agreement has been placed on record along with the plaint. It has been pleaded in the fresh suit that the plaintiff has been requesting the defendant to execute the sale deed but he is turning a deaf ear to his requests. The other pleadings of the suit are more or less in conformity with the assertions made in the earlier suit. The plaintiff, however, has claimed a decree for declaration that agreement dated 6th July, 2011, be declared as valid and binding upon the defendant.

He has sought a further declaration that he is owner in possession of the suit property. The plaintiff has also sought a permanent prohibitory injunction restraining the defendant from raising any sort of construction on the suit land and from creating third party interest. The plaintiff has further sought a decree of mandatory injunction directing the defendant to execute a registered sale deed in his favour in respect of the suit land.

9) The petitioner/plaintiff has challenged the impugned order passed by the learned trial court whereby permission has been granted to the respondent No.1/defendant to file a fresh suit, as also the fresh suit filed by the plaintiff on the grounds that it was not open to the learned trial court to grant permission to the plaintiff to withdraw the suit on the ground that the same was suffering from formal defect as there was no formal defect in the suit. It has been contended that a court can grant permission to file a fresh suit only if a suit suffers from formal defect and in no other circumstances. It has been further contended that the learned trial court has not satisfied itself as to whether the defect sought to be removed was of such a nature as would have been fatal to the suit and whether the said defect could not have been corrected by amending the suit. It has been further contended that the impugned order passed by the

learned trial court is totally perverse and manifestly arbitrary and, therefore, even the proceedings in the impugned suit are liable to be quashed. It has also been contended that the subsequent suit filed by the plaintiff contains averments which are wholly inconsistent with the earlier suit and the plaintiff has sought reliefs which were not sought in the earlier suit.

10) I have heard learned counsel for the parties and perused record of the case.

11) At the centre of controversy in this case is the provision contained in Order 23 Rule 1 of the Code of Civil Procedure, which reads as under:

ORDER XXIII – WITHDRAWAL AND ADJUSTMENT OF SUITS

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

(1) 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:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other persons.

(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.

(4) *Where the plaintiff-*

(a) *abandons any suit or part of claim under sub-rule (1), or*

(b) *withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.*

(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.*

12) From a perusal of the aforesaid provision, it is clear that a plaintiff has an absolute right of withdrawal or abandonment of the suit or part of his claim. Sub-rule (3) of Rule (1) quoted above, gives discretion to the court to permit the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim after granting plaintiff the permission to withdraw from such suit or such part of claim with liberty to institute a fresh suit in respect of the subject matter of such suit or part of the claim. Thus, the court is vested with jurisdiction to permit a plaintiff to withdraw a suit or a part of claim and in case such plaintiff does not desire to file a fresh suit for the same subject matter and on the same cause of action, no permission of the court is needed for withdrawal of the suit but if the plaintiff desires to file a fresh suit on the same subject matter and on the

same cause of action, the court has discretion to allow the plaintiff to do so. This can be done by the court only if it is satisfied that the suit would have failed by reason of some formal defect or there are sufficient grounds to the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim. The court, while permitting a plaintiff to file a fresh suit, can also impose such terms and conditions as it thinks fit.

13) Thus, permission to file a fresh suit on the same subject matter and on the same cause of action can be granted to a plaintiff only on two grounds; (i) when the court is satisfied that suit must fail by some reason of formal defect; or (ii) there are sufficient grounds for allowing the plaintiff to file a fresh suit.

14) The Supreme Court has, in the case of **V. Rajendran and another vs. Annasamy Pandian**, (2017) 5 SCC 63, while interpreting the provisions contained in Order 23 Rule 1(3) CPC, explained the scope of the said provision in the following manner:

10. In K.S. Bhoopathy v. Kokila [K.S. Bhoopathy v. Kokila, (2000) 5 SCC 458], it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or

“sufficient grounds”, such right cannot be considered to be so absolute as to permit or encourage abuse of process of court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order 23 Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 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. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

15) From the foregoing analysis of law on the subject, it is clear that it is the duty of the court to be satisfied about the existence of a formal defect or sufficient grounds before granting permission to withdraw the suit with liberty to file a fresh suit on the same cause of action. The Court has gone on to explain the term “formal defect” by stating that it is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of the parties, failure to disclose a cause of action. The Court, however, in the said case has not explained the expression “sufficient grounds” appearing in clause (b) of sub-rule (3) of Rule 1 of Order 23 CPC.

16) Learned counsel for the petitioner has submitted that clause (b) has to be read as *ejusdem generis* with those in

clause (a), meaning thereby that the ground incorporated in “sufficient cause” should be analogous to the “formal defect”. In this regard, the learned counsel has relied upon the judgment of Bombay High Court in the case of **Kashinath vs. Vishnu**, 2017 SCC Online Bom. 410. In the said case, Bombay High Court, after relying upon the judgment of the Full Bench of the same Court in the case of **Ramrao Bhagwantrao Inamdar vs. Babu Appanna Samage**, AIR 1940 Bombay 121, has held that the grounds mentioned in Rule 1(2)(b) must be analogous with the grounds mentioned in Rule 1(2)(a) of Order 23 of the Code.

17) However, a contrary view has been taken by this Court in the case of **Fateh Shah vs. Mst. Bega**, AIR 1964 J&K

18. The relevant observations of this Court are quoted below:

"The very fact that the Legislature has given two different grounds in O. 23 R. 1(2) (a) and (b) for allowing withdrawal of the suit indicates that the grounds are separate and independent and not allied or analogous. The word 'other' before 'sufficient grounds' clearly indicates that the sufficient grounds contemplated by the Legislature would be grounds other than those mentioned in sub-cl (a) of Order 23, Rule 1(2), Finally, where the Legislature intended that the words should be used and read as ejusdem generis they have been incorporated in the same sentence or in the same clause. The rule of ejusdem generis would apply only if the general words follow the specific words in the same sentence or in the same clause. But it would not apply to if the words are employed in a different sub-clause altogether and are not associated or coupled together. Thus, the words "other sufficient grounds" in sub-clause (b) cannot be read as being analogous to the grounds

given in sub-clause (a) and these words give a direction to the trial court to allow the withdrawal of the suit, if it is satisfied that there are sufficient grounds for allowing the prayer of the plaintiff."

18) The aforesaid position of law has been reiterated and reaffirmed by this Court in the case of **Pt. Lok Nath & anr. vs. Pt. Bhagwan Dass & Ors.** 1980 KLJ 399.

19) In view of the authoritative pronouncement of this Court in **Fateh Shah's** case (supra), it can safely be stated that the words "other sufficient grounds" appearing in clause (b) are not to be read as analogous to the grounds given in sub-clause (a) and it has to be held that the aforesaid words give a wide discretion to the trial court to allow withdrawal of a suit if it is satisfied that there are sufficient grounds existing for allowing such prayer of the plaintiff.

20) Keeping the aforesaid legal position in mind, let us now advert to the facts of the present case. In the instant case, as already noted, in the first suit, the plaintiff had sought a permanent prohibitory injunction against the defendant for restraining him from interfering in his peaceful possession over the suit land but it was pleaded in the plaint filed in the first suit itself that the plaintiff had purchased the land in question after paying the sale consideration of Rs.50,000/ to the defendant and that

defendant had agreed to vest ownership rights in respect of the suit property in his favour. Despite these pleadings, the plaintiff had only prayed for a decree of permanent prohibitory injunction without seeking a decree of declaration or specific performance of agreement. Therefore, the plaintiff had omitted to seek the appropriate relief in the first suit. Although in the application filed by the plaintiff seeking withdrawal of the suit and permission to file fresh suit, it is not specifically mentioned that he had omitted to seek appropriate relief in the first suit, nonetheless it has been specifically mentioned that there are certain omissions and mistakes made while drafting the first suit. This has been explained by learned counsel for the plaintiff while arguing the application before the learned trial court.

21) The question arises as to whether omission to seek appropriate relief in a suit would be covered by any of the clauses of sub-rule (3) of Rule 1 of Order 23 CPC. In the opinion of this Court, failure of the plaintiff to incorporate the appropriate prayer in the suit, which would result in dismissal of the suit, is certainly a defect which provides a sufficient ground for permitting the plaintiff to come to court again with a properly drafted plaint. Similar views have been expressed by the High Court of Orissa in the case

of **Atul Krushna Roy vs. Rajkishore Mohanty**, AIR 1956 Orissa 77, which was later on followed by the same High Court in the case **Brajamohan Sabato vs. Sarojini Panigrahi and another**, AIR 1975 Orissa 39.

22) As already stated, the expression “sufficient grounds” appearing in clause (b) of sub-rule (3) of Rule 1 of Order 23 CPC, gives a judicial discretion to the court to consider whether the grounds stated by the plaintiff should be accepted as sufficient to permit him to file a fresh suit after removing the defects in the suit pending before the court. This expression has to be given wide connotation and it cannot be given a restrictive meaning so as to shut out a fair trial on merits. Merely because some error has been made by the plaintiff in good faith, his case cannot be shut out as the same would cause grave prejudice to him. Such error can be set right only by giving a right of fresh trial to the plaintiff. This is the objective of Order 23 Rule 1(3) clauses (a) and (b) CPC.

23) Learned counsel for the petitioner has vehemently contended that it was open to the plaintiff to seek amendment of the plaint instead of seeking permission to file fresh suit. It has been contended that incorporation of additional relief on the basis of same pleadings could have

easily been granted by the trial court by permitting the plaintiff to amend the suit. He has contended that by allowing the plaintiff to file a fresh suit on same cause of action, the provisions contained in Order 2 Rule 2 CPC have been rendered redundant.

24) As has been already stated, the plaintiff on the basis of the averments made in the plaint filed in the first suit was required not only to seek relief of permanent prohibitory injunction but he was obliged to seek the relief of declaration as also the relief of specific performance of agreement on the basis of which he claimed to be in possession of the suit land. Without seeking these reliefs his suit was bound to fail. The provisions contained in Order 6 Rule 17 of the CPC cannot circumvent the provisions contained in Order 23 Rule 1 CPC. If the contention of the petitioner/defendant is accepted, then in every case where a suit can be amended, the permission to withdraw the suit cannot be granted. This would render the provisions of Order 23 Rule 1 CPC redundant.

25) The Legislature has vested power in the court in terms of Order 23 Rule 3 to grant permission to withdraw the suit with liberty to file a fresh suit on the same cause of action provided the conditions mentioned in the said Rule are satisfied. Thus, the trial court is empowered to grant

permission to withdraw the suit with liberty to file fresh suit on the same cause of action if sufficient grounds are made out and justice and equity demands so. The argument of learned counsel for the petitioner/defendant is, therefore, is without any substance.

26) The learned trial court, while passing the impugned order and granting permission to the plaintiff to file fresh suit on the same cause of action, has exercised its discretion on sound principles of law. The discretion exercised by the trial court cannot be the subject matter of judicial review by this Court in exercise of its supervisory jurisdiction, particularly when the said discretion has been exercised by the learned trial court in accordance with law.

27) For the foregoing reasons, I do not find any merit in this petition. The same is dismissed accordingly. Interim direction, if any, shall cease to be in operation.

28) No order as to costs.

29) A copy of this judgment be sent to the learned trial court for information.

(Sanjay Dhar)
Judge

Srinagar,
16.05.2025
“Bhat Altaf”

Whether the **judgment** is reportable: **YES**