

**ORDER BELOW EXHIBIT - 13**

- (1) Defendant has moved this application vide exh. 13 under O.7, R.11 and O.23, R.1, 2 & 3 for dismissal of the suit as this suit is barred by law of limitation. Plaintiff has replied vide Exh. 17.
- (2) Ld. Advocate of the defendant Mr. H. K. Vyas made submission as per his application i.e. Exh. 13 those are not mentioned here to avoid the duplication of the facts. There is no further averments made by the learned advocate of the defendant.
- (3) Ld. Advocate of the plaintiff Mr. B. R. Rathod has strongly objected this application and replied vide Exh. 17 and made submission as per the reply given by him those are not mentioned here to avoid the duplication of the facts. There is no further averments made by the learned advocate of the plaintiff.
- (4) Therefore, the question is whether the reasons given by the defendant are genuine and sufficient enough to reject the suit as barred by law of limitation under Order 7, Rule 11 & Order 23, Rule 1, 2 and 3 of Civil Procedure Code – 1908 ?
- (5) I have perused the averments made in this application by the defendant, the averments made by the plaintiff in the reply. Read the relevant papers on

the record.

(6) Before discussing about this application it would be helpful to go through the relevant provision of the C.P.C. & other act.

**Order 7, Rule 11(d) – Rejection of plaint – The plaint shall be rejected in the following cases :-**

(a) . . .

(b) . . .

(d) Where the suit appears from the statement in the plaint to be barred by any law;

**Article – 58 of the Limitation Act :** It is read as under :

“ To obtain any other declaration – Three Years – When the right to sue first accrues.”

(7) The contention of the defendant that plaintiff has filed the earlier suit (i.e. RCS No – 7/13) and which was withdrawn by the plaintiff and there was no order passed by the court that suit is withdrawn with a permission to file a fresh suit under the circumstances this suit is not tenable and deserve to be rejected. The above mentioned contention is deserve to be rejected because as per the Mark 23/1 & 12/4/7 (i.e. Withdraw pursis of RCS No : 7/13) it is specifically mention by the plaintiff that suit is withdrawn with a liberty to file a fresh suit in future. As per Mark 12/4/2 (i.e. Order below plaint of RCS No : 7/13) court passed the the order that suit is withdrawn vide exh. 35 hence disposed off.

Now the question is plaintiff can file a fresh suit even though court has not passed the order regarding filing the fresh suit specifically ?

In the case of *Rajasundari w/o Sivaramakrishnan v/s Gowri alias Avaduai Ammal and Ors.* reported in **AIR 2006 MADRAS 156**. Where in Hon'ble court held in paragraph 12 & 15 that application to withdraw suit with liberty to file fresh suit. Must either be allowed or refused in toto. Order simply allowing withdrawal but refusing liberty to file fresh suit would be without jurisdiction.

In the case of *Bharat and others v/s Ram Pratap and others* reported in **AIR 1985 ALLAHABAD 61**. Where in Hon'ble court held in paragraph 14 that application for withdrawal of suit with permission to file fresh suit. Application allowed. Absence of specific order granting permission to file fresh suit. Held, it could not be inferred that this prayer was refused.

As discussed in above mentioned decisions it is cleared that if plaintiff has moved the application to withdraw the suit with a liberty to file a fresh suit and court had passed the simple order for withdrawn then plaintiff has right to file a fresh suit. Therefore it is the humble opinion of this court is the above mentioned decisions would be helpful to plaintiff.

(8) The contention of the defendant that present suit is barred by law of limitation is deserve to be rejected because the cause of action was arose on 05/08/2013. Plaintiff is filing the present suit for declaration, perpetual injunction and partition. As per article 58 of limitation act suit for declaration

shall be filed within three years from when right to sue first accrues. In the case on hand right to sue was accrued on 05/08/2013. Therefore suit shall be filed within three years from that date. Therefore the present suit is within the limitation.

Now the question is whether partition suit can be filed again when earlier suit was withdrawn and property was not partitioned effectively ?

In the case of S. Jaswant Singh v/s Darshan Singh reported in **AIR 1992 DELHI 80**. Where in Hon'ble court held in paragraph 9 that in the partition suit cause of action is recurring. Dismissal or withdrawal of suit for partition. Subsequent suit not barred as long as property is not partitioned effectively. The fact of this suit and above mentioned decision is same. Hence, it is the humble opinion of this court is the above mentioned decision would be helpful to plaintiff.

In the case on hand as discussed above the averments made by the defendant that suit is barred by law of limitation under Order 7, Rule 11 & Order 23, Rule 1, 2 and 3 of Civil Procedure Code – 1908 is deserve to be rejected. Therefore, looking to the facts of the case on hand, this court of the view that the reasons shown by the defendant are seems to be not genuine and sufficient enough to reject the plaint. Under the circumstances, in the interest of justice, this court pass following order.

## **ORDER**

1. The application of the defendant i.e. exh. 13 is hereby rejected.
2. No order as to costs.

Order pronounced in the open court today on 14th December 2015.

Date : 14/12/2015

Place : Vijaynagar

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( Keyur Kiritbhai Patel )

Principal Civil Judge, Vijaynagar.

( Judge Code : GJ 00950 )