

IN THE COURT OF THE I ADDITIONAL CIVIL JUDGE AND
J.M.F.C., CHIKODI.

Present: Ashok R H
I Addl. Civil Judge & J.M.F.C.,
Chikodi.

Dated this 05th day of March, 2022

O.S.No.112/2015

Plaintiffs: 1) Baburao Ramu @ Ramachandra Nimbalkar,
R/o: Sadalaga.

//Vs//

Defendant: 1) Rajendra S/o Mahadev Nimbalkar,
R/o: Sadalaga and others.

I.A.No.13

Applicant/Ori.Plaintiff:

1. Baburao Ramu @ Ramachandra Nimbalkar,

//Vs//

Opponents/Ori.Defendant:

1. Rajendra S/o Mahadev Nimbalkar,

ORDERS ON IA No.13

The plaintiff has filed this application U/O 23 Rule 1
R/W Sec.151 of Code of civil Procedure, 1908 seeking
permission to withdraw the suit.

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2. In the accompanying affidavit, the plaintiff has stated that he has filed this suit for the partition and separate possession in respect of the suit property against the defendants. Due to wrong advise, he has filed this suit and now he is not interested in preferring the case. He has stated that he has no share in the suit properties. He has abandoned his claim over the suit properties. Hence, he does not want to prosecute the suit. Hence, permission is sought to withdraw the suit.

3. The defendant no.3 has filed objections contending that he has already filed his written statement and counter claim on 12.06.2015. Now the plaintiff is colluding with the defendants No.1, 2 and 4 to 6 with an intention to grab the joint 1/4th share in respect of suit schedule 'A' properties at serial no.1 to 3. The house property bearing GPC.No.4889 situated at Abdullat village, Tq: Shirol, Dist: Kolhapur is not included. The defendant no.3 is working as a mechanic and out of his own earning, he has purchased the land measuring 03 acres on northern side out of RS.NO.901/1+2 of Sadalaga

village for a valuable consideration of Rs.69,000/- and the name of the defendant no.3 is entered in ME.NO.933 of Sadalaga village. Thus the property at schedule-A Sl.No.4 is the self acquired property of the defendant no.3. The plaintiff himself has filed memo on 11.06.2015 stating that the plaintiff has received an amount of Rs.2 lakh from the defendants no.1, 2 and 4 to 6 in lieu of his joint share. The said memo was rejected on 31.05.2019. The written statement and the counter claim filed by the defendant no.3 was treated as a plaint. The plaintiff has again filed this application under Order XXIII Rule 1 R/w Section 151 of CPC. It is contended that the plaintiff has falsely stated that he has filed this suit due to wrong advise. Receiving an amount of Rs.2 laksh by the plaintiff itself shows that the plaintiff has colluded with the remaining defendants. The defendant no.3 has claimed his share by way of counter claim and has also paid necessary court fee. It is contended that if the application is allowed, the defendant no.3 will be put to loss and hardship. On these grounds, he has prayed to reject the application.

4. Heard. The points that would arise for the consideration of this Court are as under:

POINTS

- 1 Whether the application filed by the plaintiff deserves to be allowed?
- 2 What order?

5. The answers of this court to the above Points are as under:

Point No.1: In the Negative

Point No.2: As per final order
for the following

REASONS

6. **Point No.1:** The plaintiff has filed this suit seeking the relief of partition and separate possession in the suit schedule properties as against six defendants. Subsequent to filing of the suit, the defendant no.7 was added in the suit. In response to the issuance of the suit summons, the defendants no.1, 2 and 4 to 6 have appeared before the court. So also the defendant no.3. In the meanwhile, it is seen that the plaintiff had filed a memo not to press the suit on 11.06.2015 wherein plaintiff has stated that the defendants no.1, 2 and 4 to 6 have

paid an amount of Rs.2 lakh in lieu of his share in the suit schedule 'A' property and hence he does not want to proceed the suit and has sought for dismissal of the suit as not pressed. The said memo was objected by the defendant no.3 herein. This court, vide its order dated 31.05.2019, had rejected the said memo. It is also forthcoming from the records that the defendant no.3 herein has filed the written statement along with the counter claim wherein he has claimed that he has 1/4th share in the suit property and he has sought for allotment of his share. The plaintiff has not filed the written statement to the said counter claim. In the meanwhile, the defendant no.2 has died and that the defendant no.3 has filed IA.No.10 to 12 to bring the legal heirs of the defendant no.2 on record. The case was posted for orders on IA.No.8 to 10. At this stage, the case was advanced at the instance of the plaintiff and the plaintiff has filed the instant application.

7. This being the background of the case, it is relevant to look into the Order 23 Rule 3 of CPC which reads as follows:

*O. 23 R 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 person.

(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.

8. Thus the plaintiff may at any time after institution of the suit, abandon his suit or abandon of part of his claim. However, the same is not an absolute right of the plaintiff. Sub section (5) to of Rule 1 of order 23 specifically provides that nothing in Rule 1 Order 23 of CPC shall be deemed to authorize the court to permit one or several plaintiffs to abandon the suit or part of the claim or to withdraw the suit under Sub-rule (3) without the consent of the other parties.

9. The question that requires consideration is that whether the rule that in a suit for partition, defendant is in the position of the plaintiff, would come into play when the plaintiff intends to withdraw the suit. Reference could be made to V.E.A.R.M Annamalai Chettiar V/s Koothappudayar and others reported in AIR 1934 Madras 485. It is observed that “ I can see nothing in partition suits which except in special circumstances above indicated and which are of general application makes it impossible for a plaintiff to withdraw his suit and so terminate the litigation. But reliance is placed on the doctrine that the

defendants in a partition suit are in the position of plaintiffs. In my opinion this means no more than that when as by a preliminary decree or compromise the defendants' shares are determined or declared, they are thenceforth in the position of plaintiffs in order to work out their rights in the same suit and need not resort to a separate suit for that purpose. That does not affect the right of the plaintiff to withdraw and terminate the litigation before such a stage has been reached. This is clearly brought out in *Ashidbai V/s Abdulla* (1906) 31 Bom. 271 where the authorities are referred to and it was concluded that the right of defendants in a partition suit to have a share allotted arises only where there has been a decree properly drawn up in favour of the plaintiff and defendants. For this purpose there can on principle be no difference between a case where the right of the plaintiff to a share is denied as in that case and one where the plaintiff being admittedly a sharer abandons it by withdrawing the suit. For, it has now been settled that where a suit for partition is withdrawn before trial, the proceedings do not establish the status of division: *Palani Ammal V/s Muthuvenkatachala Moniagar* A.I.R. 1925 P.C. 49 and

Krishnaswami Naidu V/s Perumal A.I.R. 1925 Mad. 112.”

10. Considering the above dictum laid down by the Hon'ble High court of Madras it is seen that the in a suit for partition until and unless the defendant's shares are determined or declared by way of a preliminary decree or compromise, the doctrine that the defendants in a suit for partition are in the position of the plaintiff is not applicable and that does not affect the right of the plaintiff to withdraw and terminate the litigation before such a stage has been reached. However the case on hand has an additional factor which required consideration. In the instant case, the defendant no.3 has filed a counter claim. It is to be seen that whether even under a circumstance where there is a counterclaim filed by the defendant, it would be a prerogative of the plaintiff to withdraw the suit.

11. It is germane to refer to the judicial precedent in the case of Pratapbhai V Trivedi V/s Priyamvada @ Ghamu Pratapbhai II (1993) DMC 25 wherein it is observed that ordinarily, the right of the plaintiff to withdraw from a suit is absolute and

unqualified right. However, as pointed out by the Hon'ble Supreme Court in the case of Hulas Rat Baij Nath where rights of other parties have come into existence, as for example, claim for set-off or counter-claim filed by the defendant, claim to receive some amount in a suit for partition under a preliminary decree already passed or a claim for share of the assets of a partnership firm already determined by preliminary decree in a suit for dissolution of account, the suit cannot be withdrawn under Order XXIII Rule 1. In exceptional cases stated hereinabove, other party to the suit may acquire some right.

12. In the instant suit it is observed that in the plaint itself the plaintiff has specifically stated that himself and the defendant no.1 to 6 constitute Hindu joint family and they are in joint possession and enjoyment of the properties and further from the memo dated 11.06.2015 it is seen that the plaintiff has received Rs.2 laksh in lieu of his share from the defendants no.1, 2, 4 to 6. The defendant no.3 has filed the counter claim. Moreover a similar attempt was made by the plaintiff by filing memo which has already been rejected by this court and the plaintiff has filed this application with the same relief which appears not maintainable. Until and unless the extent of rights

of the parties herein ie., their share is not determined, it cannot be held that the plaintiff has absolute right to withdraw the suit. The eventuality that on permitting the plaintiff to withdraw the suit, the plaintiff may not contest the counterclaim or not at all appear in the suit and the decision of the court on the counter claim, if any, is adverse to the plaintiffs' interest, he may then claim his non acquaintance cannot be ruled out. The nature of the suit is such that when a counter claim is made by the defendant, the plaintiff's suit cannot be permitted to withdrawn. Allowing the application appears thus not fit. Therefore, this court is of the considered opinion that the application filed by the plaintiff is liable to be rejected. For these reasons, this court has answered Point No.1 in the Negative.

13. **Point No.2:** In view of answer to Point No.1, this court proceeds to pass the following

ORDER

IA.No.13 filed by the plaintiff U/O 23
Rule 1 R/W Sec.151 of Code of civil
Procedure, 1908 is hereby rejected.

(Dictated to the Stenographer, transcribed and typed by her, corrected and then pronounced by me in the Open Court on this 05th day of March, 2022)

Sd/-

(Ashok R.H)

I Addl. Civil Judge & JMFC., Chikodi.

