

**In The Court of Smt. Priyanka Saikia, Munsiff No. 2,
Sonitpur, Tezpur**

Case No: Misc(J) No. 56/2022

(I/c Title Suit No. 04/2011)

Animesh Das –vs- Shymal Acharya

21.11.2022

The instant Misc (J) Case has been registered on the strength of petition no. 303/2022 dated 24-02-2022 under Order XXIII Rule 1(3) of CPC for seeking permission to withdraw the suit and institute a fresh suit.

The plaintiff/petitioner has stated that the petitioner/plaintiff had filed the present suit against the defendants namely Sri Shyamol Acharjee, his wife Smt. Sumita P. Acharjee seeking and praying inter-alia for reliefs of declaration of right, title interest of the plaintiff/petitioner and for recovery of possession by evicting the defendants from the land mentioned in the schedule of the plaint more particularly from schedule B land of the plaint and for permanent injunction. During the pendency of the suit the defendants continued their encroachment of the suit land and also started illegal construction of a garage and other structures over the encroached land of the plaintiff. Although the plaintiff/petitioner had filed the suit mentioning the measures of the encroached land as 17.3 lessas in the plaint, but the encroachment by the defendants unabated and now the measure of the encroached land stands at

more than 1 Katha. In the mean time the plaintiff/petitioner had moved two petitions one under Order VI Rule 17 of the CPC for amendment of the plaint regarding the measure of the encroached land which was registered as Misc (J) Case No. 175/2018 which has since been disposed off dated 06-10-2021 by this Hon'ble Court finding anomalies in the report of the Circle Officer of 2 different Revenue Circles viz. Dhekiajuli Revenue Circle and Thelamara Revenue Circle.

That another petition dated 20-11-2020 was also filed by the plaintiff/petitioner under Order XXXIX Rule 1 & 2 of the CPC seeking and praying for prohibitory injunction against the defendant/opposite parties their men and agents from illegal construction of garage on the land of the plaintiff's/petitioner described in schedule B of the plaint. That upto the said date of filing of the petition the defendants was in the process of constructing a pucca garage but in the mean time the defendants has completed the said illegal construction and encroached land has also increased in measure. That therefore the petition for prohibitory injunction as filed by the plaintiff/petitioner vide Misc(J) case No. 52/2020 has become in fructuous and unsustainable and shall not yield and desired result in favour of the plaintiff/petitioner in case the suit is continued in its present form. That in view of the above it is abundantly clear that substantial formal defect has taken place/occurred in the suit of the plaintiff and the plaintiff is likely to be deprived from getting appropriate relief and

due share of justice if the suit is continued by him in its present form.

Hence the plaintiff petitioner considers it utmost necessary at this stage to withdraw the suit and to file a fresh suit on the same subject matter with necessary changes to remove the formal defects that has occurred due to passage of time

Perused the case-record and heard the Ld. Counsel for the plaintiff/petitioner.

The learned counsel for the defendant/opposite party has vehemently objected the petition and stated that is not maintainable under law and equity and hence the petition is liable to be rejected. The petition under Order XXIII Rule 1(3) of CPC is completely a vague petition and on the basis of such vague petition no order could be passed in this case. Though the plaintiff petitioner has mentioned about the area of encroached land as 17.3 lessas but in fact the plaintiff petitioner has sought recovery of possession for only 7.3 lessas of land in his plaint. Besides at no point of time during the pendency of the suit, the opposite parties encroached any portion of the suit land as claimed by the petitioner. Further it is true that the petitioner has filed an application under Order XXXIX Rule 1 & 2 of CPC seeking and praying for prohibitory injunction against the defendant opposite parties etc. of the petition. But it is completely false that upto the said date of filing of the petition the defendant was in the process of constructing a pucca garage but in the mean time the defendant has

completed the said illegal construction and encroached land has also increased in measure as alleged of the petition. During the pendency of the suit, if any subsequent event of encroachment ever happened as alleged by the plaintiff at any point of time, than the plaintiff should have informed the Hon'ble court for taking note of such illegal act of the defendants. But nothing is available in the case record. The plaintiff has stated in his petition that substantial formal defect has taken place / occurred in the suit but the plaintiff has failed to specify the formal defects in his petition. Mere repetition of expression of formal defect is not sufficient to grant permission as contemplated under sub Rule 3 of Order XXIII R.1 of Civil Procedure Code. More so, the plaintiff's petition for withdrawal of suit is filed to abuse the process of law and to fill up the lacunae that too when the defendants had disclosed the defense. The plaintiff petitioner instead of seeking withdrawal of suit can seek amendment of his pleading under Order VI Rule 17 of CPC if he intends to continue with the proceeding. Since the plaintiff could not specify the formal defects which is likely to lead to dismissal of his suit nor any other sufficient grounds are made out for permitting the plaintiff petitioner to institute a fresh suit in respect of the same subject matter.

Heard the counsel for both parties and perused the case record.

The plaintiff/petitioner has stated that a formal

defect in the suit wherein defendants have completed the said illegal construction and encroached land has also increased in measure. As such, the petition for prohibitory injunction as filed by the plaintiff/petitioner vide Misc(J) case No. 52/2020 has become in fructuous and unsustainable.

To determine this instant petition, I would like to discuss the provision:

Order XXIII Rule 1(3) reads as follows:

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.

I would like to relied on judgment passed by the Supreme Court in **V. Rajendran v. Annasamy Pandian reported in (2017) 5 SCC 63**, wherein it has held that after considering the judicial opinions of various High Courts, "formal defect" is a defect of form prescribed by the rules of procedure. For example, want of notice under Section 80 CPC, improper valuation of the suit, affixing insufficient court fee, ambiguity regarding identification of the suit property, misjoinder of parties, failure to disclose a

cause of action, etc. The Supreme Court further observed that "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. It can be observed that many of the "formal defects" pointed out by the Supreme Court are grounds for rejection of plaint under Order 7 Rule 11 CPC.

Other condition is "sufficient grounds" under clause (b) of sub-rule (3). Since various High Courts have made diametrically opposite interpretations of the term other "sufficient grounds" in sub-rule (3)(b), it has always remained an area of contention, as will be seen from the case laws discussed herein. The Madras High Court in **C. Jagadeesan v. T. Baskaran** reported in **2019 SCC OnLine Mad 13123** by relying on its own decision in **Duraikannu v. Malayammal** reported in **2003 SCC OnLine Mad 593**, has held that other "sufficient grounds" must be considered ejusdem generis with "formal defect" in clause (a) of sub-rule (3) since such sufficient ground means a defect that does not result from the plaintiff's own fault. Plaintiff's failure to prove his case is not "sufficient ground" within the ambit of clause (b) of sub-rule (3).

In the instant petition the petitioner/plaintiff has pleaded that there is a formal defect in the suit for which there is possibility of failing of the suit for which the suit may be allowed to be withdrawn with a liberty to file afresh on the same cause of action and claiming same reliefs. So, there is a formal defect for allowing the plaintiff to

withdraw the suit with a liberty to file a fresh suit without changing the subject matter of the suit.

Therefore, in the light of all the aforesaid discussion, this court is of considered opinion that if the case is allowed to withdraw with a liberty to file a fresh suit on the same cause of action and claiming same reliefs, the other side will not be prejudiced, rather it will help the court to arrive at a proper conclusion of dispute.

So, the prayer of the petitioner/plaintiff vide petition No. 303/2022 filed by the plaintiff praying to withdraw the suit with a liberty to file a fresh suit is allowed. While allowing this petition a cost of Rs. 20,000/- is imposed on the petitioner which will be a condition precedent for accepting any fresh case brought by the petitioner as this case was registered in the year 2011.

The Misc(J) Case stands disposed of.