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**(2020) 12 CHH CK 0011**

**Chhattisgarh High Court**

**Case No:** Civil Revision No. 157 Of 2017

Devdutt

APPELLANT

Vs

Shashi Verma And Ors

RESPONDENT

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**Date of Decision:** Dec. 14, 2020

**Acts Referred:**

- Code Of Civil Procedure 1908 - Section 2(2), 11, 115, Order 22 Rule 10, Order 23 Rule 1, Order 23 Rule 1(3), Order 23 Rule 1(4)

**Hon'ble Judges:** Sanjay S. Agrawal, J

**Bench:** Single Bench

**Advocate:** Sharmila Singhai, Y. C. Sharma, Sachin Nidhi, Raghavendra Verma

**Final Decision:** Dismissed

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### **Judgement**

Sanjay S. Agrawal, J

1. This Revision Petition has been preferred by Defendant No.2 Devdutt under Section 115 of the Code of Civil Procedure, 1908 (hereinafter referred

to as the 'CPC') questioning the legality and propriety of the order dated 24.07.2017 passed by the Second Civil Judge Class-I, Bemetara, District

Bemetara (C.G.) in Civil Suit No.54A/16, whereby the trial Court, while answering Issue No.6, has held that the suit for partition as claimed by the

Plaintiff, cannot be held to be not maintainable on account of the dismissal of her earlier claim in Civil Suit No.20-A/2010, which was withdrawn on

20.06.2012 without obtaining the leave for filing a fresh one. The parties to this Petition shall be referred hereinafter as per their description before the

Court below.

2. Briefly stated the facts of the case are that the Plaintiff Smt. Shashi Verma instituted a suit claiming declaration of title, partition, injunction and also for mesne profits with regard to the properties described in plaint Schedule 'A' and 'B'. According to her, it was held by her grandfather Chaitram Verma, who had two sons and a daughter, namely, Padum singh (her father), Devdutt and Sushila Bai respectively. It is pleaded further that after the sad demise of her grandfather (Chaitram), the ancestral property owned by him was divided, amongst his sons and daughter, except 5.750 hectares of land of village Amora, while the properties situated at village Kobia are recorded in joint names of her father Padum Singh and uncle Devdutt, which are described in detail in Plaint Schedule 'A'. It is pleaded further that after the death of father Padum Singh, it was partitioned by his sons (Defendants No.4 to 7) without providing the share to her and sisters and likewise, nothing was provided with regard to the properties situated at village Amora and Navagaon as described in Plaint Schedule 'B'.

3. It is pleaded further that earlier claim of her, being Civil Suit No.20-A/2010 seeking partition along with other reliefs, was withdrawn on 20.06.2012 because of the assurance given by Defendants No.1 to 7, who are mother, uncle, aunt and brothers, but after the withdrawal of the said suit, they started misbehaving and refused to provide her share after obtaining her signature in blank papers. She has, therefore, been constrained to institute the suit in the instant nature on or about 06.05.2016.

4. While contesting the suit, it was pleaded by Defendants No.1 to 7 that since the Plaintiff had withdrawn her earlier suit of similar nature on 20.06.2012 without obtaining the permission for filing of a fresh one, therefore, the suit as framed is not maintainable and deserves to be dismissed.

5. After considering the pleadings of the parties, the trial Court has framed the issues on 05.07.2017 and one of the issues, i.e., issue No.6, which is relevant for the purpose, reads as under:-

06- 20 /2010 20.06.2012

6. Aforesaid issue has been considered by the trial Court in the light of the provisions prescribed under Section 11 of the CPC and that by considering the order sheet dated 20.06.2012, which was passed in an earlier instituted suit, being Civil Suit No.20-A/2010, it has arrived at a conclusion that since

the earlier suit was not decided on merits and, therefore, the instant suit cannot be held to be not maintainable while answering the issue in negative.

This is the order which has been impugned by way of this revision petition.

7. Ms. Sharmila Singhai, learned counsel appearing for the Applicant/Defendant No.2 submits that the finding of the trial Court, while contesting the

aforesaid issue by holding that the instant suit is maintainable, is apparently contrary to law. According to her, since the earlier suit (Civil Suit No.20-

A/2010) was withdrawn by the Plaintiff on 20.06.2012 without obtaining the leave of the Court for filing a fresh suit in respect of the same subject

matter as provided under Order 23 Rule 1(3) of CPC, therefore, the suit as framed cannot be held to be maintainable. Having failed to consider the

said issue in its proper manner, the trial Court has committed a serious illegality in proceeding ahead with the suit. In support, she placed her reliance

upon the decisions rendered in the matters of R. Rathinavel Chettiar and another vs. V. Sivaraman and others (1999) 4 SCC 89a nd Kandapazha

Nadar and others vs. Chitraganiammal and others reported in (2007) 7 SCC 65 respectively.

8. On the other hand, Shri Y. C. Sharma, learned counsel for Non-applicant No.1/Plaintiff has supported the order impugned as passed by the Court

below.

9. I have heard learned Counsel for the parties and perused the entire papers annexed with this petition carefully.

10. It appears from perusal of the record that a suit for declaration of title and partition along with other ancillary reliefs has been filed by the Plaintiff

with regard to the ancestral properties originally owned by her grandfather Chaitram as described in Plaint Schedule "A" and "B" on the

ground that after the sad demise of him, it was divided amongst his sons and daughter Sushila Bai and after the death of her father Padum Singh, it

was obtained by her brothers alone without providing any share of it either to her or her sisters. It appears further from the averments made at

paragraphs 10 & 11 of the plaint that the earlier suit, being Civil Suit No.20-A/2010, was withdrawn on 20.06.2012 owing to the assurance given by

the Defendants for providing her share over the property in question, but as they have refused to act upon that, therefore, the instant claim has been

made. Subject matter of both the suits is similar in nature as the Plaintiff has claimed her one-eighth share each with regard to the property in question, as was claimed in her earlier instituted suit.

11. It is true that the earlier suit was withdrawn on 20.06.2012 without obtaining permission from the Court for filing a fresh suit, but the cause of action in a suit for partition is a recurring one, therefore, it was not necessary for the Plaintiff to obtain a permission of the concerned Court before the withdrawal of her earlier claim and in view of that, the bar as provided under Order 23 Rule 1(4) of CPC for filing a fresh suit of a similar nature would not be attracted. It is to be noted at this juncture that principles have been laid down by the Karnataka High Court in the matter of Seenappa & Ors. vs. Subbaiah & Ors. reported in ILR 1999 KAR 154,3 wherein, the Plaintiff's suit for partition and separate possession was returned with a direction for its presentation before a Court having its jurisdiction to entertain the same. However, the Plaintiff, instead of acting on such a direction, instituted a fresh suit for the same relief. In that factual scenario, it was observed therein at paragraph 7 that the bar embodied in sub-rule (4) of Rule 1 of Order 23 of CPC would not be attracted as a cause of action for a suit for partition and separate possession being a recurring cause of action and, therefore, the withdrawal of earlier suit without seeking leave of the court would not debar the Plaintiff for filing a fresh suit of a similar nature.

The relevant portion of the said para 7 reads as under:-

7. ".....Apart from this fact, as rightly pointed out by the trial Court, the cause of action for a partition suit being a recurring cause of action, withdrawal of an earlier suit for partition of joint family properties though without permission of the court, is not a bar to file a second suit for partition of the same properties against the same defendants. For this reason also though the plaintiffs have not obtained permission of the City Civil Court for filing a fresh suit by withdrawing the earlier suit, they are entitled to file a fresh suit for partition and the bar under Order 23 Rule 1(4) CPC does not apply to such a suit....."

12. Similar is the observation made by the Nagpur High Court while entertaining the suit for partition in the matter of Abdul Majid Kha s/o

Mahebubkha vs. Mahmudabi w/o Bahadurkha reported in AIR 1949 Nagpur 366 at para 7 as under:-

7. "....The right to demand partition and separate possession is a recurring right. If the plaintiff, for any reason, decided on 2nd April 1946 not to

enforce the right immediately, she should be deemed to have chosen to continue the tendency in common for some time more till she would find it

necessary again to seek its termination. A suit which is barred by withdrawal of the claim under O. 23, R.1(3) is one which is based on the same

cause of action but a suit for partition and separate possession of the share which may now be brought will be on a cause of action arising upon a

demand now made and refused: Radhe Lal v. Mulchand, 46 ALL. 820 : (A. I. R. (11) 1924 ALL. 905.) If defendant 11 made a promise to give an

equal area out of his other lands and if that is enforceable in law, the plaintiff can sue for specific performance of that contract and, in the alternative,

make a claim on the original cause of action for share in the lands of her father.

13. It is, thus, clear in the light of principles laid down in the aforesaid matters that in a suit for partition, the cause of action, being a recurring cause of

action and, the withdrawal of an earlier suit of a similar nature without obtaining the permission from the Court would not debar the Plaintiff for the

institution of a fresh suit for partition. In view of the said background, the institution of the instant suit cannot be held to be hit by virtue of the provision

prescribed under Order 23 Rule 1(4) of CPC.

14. In so far as the principles laid down in the matter of R. Rathinavel Chettiar and another vs. V. Sivaraman and others (supra), as relied upon by

Ms. Singhai, are concerned, it, however, appears to be distinguishable from the facts involved in the present matter as in the said matter, a suit was

instituted by the Plaintiff V. Sivaraman against the widow of his brother, namely, Shakunthala for declaration of title and possession along with other

ancillary reliefs like arrears of rent and mesne profits. The said suit was decreed and during the pendency of appeal preferred by Widow Shakunthala,

the decree holder/Plaintiff had sold the property in question to the appellant R. Rathinavel, who was impleaded therein as one of the respondents

under Order 22 Rule 10 of CPC and during the pendency of it, the said Plaintiff, who had already transferred the property in question to the said

appellant, had arrived at a compromise with the widow of his brother and applied for withdrawal of the suit, which was allowed by the appellate

Court. The said withdrawal was questioned by the said transferee before the Supreme Court and, a question as to whether, under such circumstances,

“can the suit be permitted to be withdrawn by the Plaintiff?” was considered and it was held that once the decree passed by the trial Court is

challenged in appeal, it would not be open to the Plaintiff at that particular stage to withdraw the suit so as to destroy that decree and the rights

accrued under the said decree cannot be taken away by way of withdrawal of the suit. The principles laid down in the said matter are, therefore,

entirely distinguishable from the facts and would not be applicable in the instant case.

15. As regards the principles laid down in the matter of *Kandapazha Nadar and others vs. Chitraganiammal and others* (supra), the same are also

distinguishable from the facts involved in the present one. In the said matter, it was held that when the suit was permitted to be withdrawn under

Order 23 Rule 1 of CPC without any adjudication, then such order allowing withdrawal of suit as such would not constitute a decree defined under

Section 2 (2) of C.P.C. The principles laid down therein are also of no use in the instant case.

16. Consequently, the revision petition is dismissed, though for the reasons different from those which weigh with the Court below. No order as to

costs.