

IN THE HIGH COURT OF DELHI AT NEW DELHI

**C.R.P. No.125/2004**

# Kamal Kumar Jain & Ors. .... Petitioners  
! through: Mr.P.C.Chopra, Adv.

VERSUS

\$ Smt.Raj Kumari Jain & Ors. .... Respondents  
^ through: Mr.J.K.Seth, Sr. Adv. with  
Ms.Shalini Kapoor, Adv. and  
Ms.Promil Seth Mango, Adv.

RESERVED ON : 18-01-2007

% DATE OF DECISION: 29-01-2007

**CORAM:**

\* **Hon'ble Mr.Justice Pradeep Nandrajog**

1. Whether reporters of local papers may be allowed to see the judgment? Y
2. To be referred to the Reporter or not? Y
3. Whether judgment should be reported in Digest? Y

: **PRADEEP NANDRAJOG, J.**

1. The present petition challenges 2 orders, dated 8.12.2003 and 23.2.2004 passed by Shri Prem Kumar, ADJ, Delhi in RCA No.11/2002.

2. The first order dismissed an application under Order 23 Rule 1 (3) of the Code of Civil Procedure filed by the

petitioners in RCA No.11/2002 praying that since the suit filed by them was dismissed substantially on account of legal defects and not on the merits of the case, leave be granted to them to withdraw the suit with liberty to file a fresh suit.

3. Vide order dated 8.12.2003, the said application was dismissed.

4. A review was sought of the order dated 8.12.2003. Order dated 23.2.2004 dismissed the review application.

5. Petitioners were the plaintiffs. They had filed suit for declaration, recovery of possession and perpetual injunction.

6. I need not note the respective stand of the parties as in my opinion no useful purpose would be served in penning down a prolix judgment. Suffice would it be to note that on the basis of the pleadings, the following 10 issues were framed:-

- “1. Whether the suit is properly valued for the purpose of court fee and jurisdiction? OPP.
2. Whether the plaintiff is the exclusive owner of the suit property?
3. Whether the suit property was a joint Hindu Family property and devolved upon his heirs after the death of Sh.Chandu Lal Jain, if so, its effect? OPD.
4. Whether the defendants relinquish their rights in the suit property, if so, its effect?
5. Whether the defendant No.1 is the licensee under the plaintiff in respect of the portion of ground floor in the suit property and is liable to surrender its

possession?

6. Whether the defendant No.1 is in occupation of the suit property in his own right as an owner of their of?
7. Whether the suit is barred by time as alleged in W.S.?
8. Whether the suit is bad for non-joinder of the necessary parties?
9. Whether the plaintiff is entitled for the relief as prayed?

10. Relief.”

7. Issue No.1 was decided by the learned Trial Judge in favour of the petitioners. Issues No.2 and 4 were decided against the petitioners. Issue No.3 was held to be irrelevant. Issue No.5 was decided against the petitioners. Issue No.6 was decided against the defendant, but to no effect. Issue No.7 was decided against the plaintiffs. Issue No.8 was also decided against the petitioners.

8. Needless to state, issues No.9 and 10 were decided against the petitioners.

9. Only issue No.8 predicates itself on the technicalities of the law.

10. Other issues required an adjudication on merits. Indeed they were disposed of on merits in light of the evidence led.

11. Learned counsel for the petitioners urged that the language of Order 23 Rule 1 CPC is very wide. It cannot be given a restricted meaning that only where a suit is liable to be dismissed on account of a technical defect, then alone power can be exercised under Order 23 Rule 1 CPC. Counsel urged that it gives a very wide power to the Court to permit withdrawal of suit with liberty to file a fresh suit on the same cause of action.

12. Counsel urged that the words '*other sufficient grounds*' are wide enough to embrace other defects as well.

13. There is no quarrel with the proposition that the words '*other sufficient grounds*' in Order 23 Rule 1 CPC empower the Court to permit withdrawal of a suit with liberty to file a fresh suit on the same cause of action and the power is not restricted only to cases where the suit filed suffers from a technical defect.

14. Where due to want of formal proof of a document, a suit is dismissed or where due to defective pleadings, a suit is dismissed, the Court would be empowered to rely upon the omnibus power under the head '*other sufficient grounds*' to grant permission to withdraw a suit with liberty reserved to file a fresh suit. But having a power is one thing. Whether facts

warrant power to be exercised is another thing.

15. Whenever permission is granted to a party to withdraw the suit and liberty is granted to file a fresh suit on the same cause of action, such permission causes prejudice to the defendants who have won the battle. Why should they be made to suffer a second round of litigation? Thus, a duty is cast upon the Court to satisfy itself that there exist proper grounds and reasons for granting permission for withdrawal of the suit with leave to file fresh suit.

16. In the report published as JT 1999 (1) SC 343 Executive Officer, Arthaneswarar Temple vs. R.Sathyamoorthy & Ors. it was observed that withdrawal of a suit can be permitted if there was no question of any adjudication on merits in favour of the defendants by the Trial being nullified by such withdrawal. If findings on merits of the Trial Court in favour of the defendant get nullified, said permission for withdrawal of the suit should not be granted.

17. It is trite that right of the plaintiff to withdraw the suit at the appellate stage is not an absolute right for rights stand acquired by the defendant under the decree. Right of withdrawal is a qualified right.

18. I have perused the application under Order 23 Rule 1

(3) of the Code of Civil Procedure filed by the petitioners.

19. It is stated in the said application that plaintiffs lost on issue No.4 inasmuch as they were not able to prove a relinquishment deed dated 2.3.1959 which they claimed as having been executed by the defendants. It is stated that they lost on issue No.2 because of said finding pertaining to issue No.4. It has been pleaded that issue No.5 was lost on account of the fact that the Trial Judge has held that it was not pleaded in the plaint as to when the licence in question was granted to defendant No.1. It is stated that issue No.8 was lost by the plaintiffs on account of technicalities of law.

20. But, no exception on account of any technicality or sufficiency has been pleaded in respect of issue No.7.

21. As noted above, issue No.7 related to the suit being within limitation or not.

22. The learned Trial Judge has held that the suit was barred by limitation.

23. If for no other reason, on said account no liberty can be granted to the plaintiffs to withdraw the suit with liberty to file a fresh suit for the reason it would be unfair and unjust to require the defendants to fight out another litigation which would obviously be barred by limitation. It would be barred by

limitation for the reason the instant suit has already been held to be barred by limitation.

24. I refrain from dealing with various judgments cited by learned counsel for the petitioners for the obvious reason none of them applies on the facts and circumstances of the present case.

25. Needless to state, principles of Order 23 Rule 1 CPC are well known and well recognized. However, the same have to be applied in the facts and circumstances of each case. A decision which is applying law to the facts of the case would obviously not be a precedent.

26. But, for record I would be failing if I do not note the decisions which were cited by learned counsel for the petitioners. The same are as under:-

1. 1973 RLR 555, Gopal Krishan vs. Smt. Bimlesh Kumari.
2. AIR 1956 Orissa 77, Atul Krushna Roy vs. Raukishore Mohanty & Ors.
3. AIR 1941 Nagpur 258, Jamnadass Nagindass vs. Beharilal Bishweshwarlal Zunzunwala.
4. AIR 1953 Nagpur (DB) 127, Manohar Rao & Anr. vs. Mt.Parwati w/o Narayan Singh & Ors.
5. AIR 1982 SC 789, Baniram & Ors. vs. Gaing & Ors.
6. AIR 1995 SC 2001, Most.Rev. P.M.A. Metropolitan & Ors. etc. etc. vs. Moran Mar Marthoma & Anr. etc. etc.

27. There is no quarrel with the proposition emanating from the said decisions that the term '*other sufficient grounds*' in Order 23 Rule 1 CPC has not to be read as ejusdem generis to the expression 'formal defect'.

28. I find no merits in the petition. The same is dismissed.

29. No costs.

January 29, 2007  
dk

**(PRADEEP NANDRAJOG)**  
**JUDGE**