

(1949) 02 MAD CK 0049
In the Madras High Court

Hasan Badsha by his Father and next Friend K. Mahomed
Ghouse Saheb

APPELLANT

Vs

Sultan Raziah Begum by her Father and Guardian-ab-litem,
Fathauddin Saheb

RESPONDENT

Date of Decision : 02-02-1949

Acts Referred:

Citation : AIR 1949 Mad 772 : (1949) 62 LW 313

Hon'ble Judges : Viswanatha Sastri, J

Bench : Division Bench

Judgement

Viswanatha Sastri, J.—C.R.P. No. 650 of 1948: This revision petition is preferred against an order of the learned Judge of the City Civil Court, Madras, in I.A. No. 1209 of 1947 in O.S. No. 706 of 1946, declining to allow the plaintiff to amend his plaint by withdrawing certain allegations made in Para. 5. The suit was laid by plaintiff, a minor, acting through a next friend, for partition and possession of a half share in a certain house property, the defendant being entitled to the other half share. In paras. 5 and 6 of the plaint, it is distinctly averred that as a division by metes and bounds was not possible, the property might be directed to be sold under the Partition Act and the proceeds divided. In Para. 9 of the plaint the plaintiff prayed for a sale of the house under the Partition Act between the parties. It is recorded by the lower Court that when the suit was taken up for trial on 26th September 1947 both parties conceded that the property was incapable of being divided by metes and bounds and that it should be sold under the provisions of the Partition Act. On the same day, the defendant who wanted to purchase the property u/s 8 of the Partition Act was given time for filing an application for that purpose, which was later on filed on 11th October 1947. On 14th October 1947 the next friend of the minor plaintiff filed the application, out of which this civil revision petition has arisen, alleging that the property was capable of a convenient division by metes and bounds, that the statements to the contrary made in paras. 5 and 6 of the plaint and before the Court on 26th September 1947 were all due to a mistake and that the proceeding should be

amended by his being allowed to withdraw those statements. The plaintiff also prayed incidentally for the appointment of a commissioner to inspect the property and report as regards the divisibility of the property by metes and bounds into two shares without affecting the value of the other share. A commissioner was accordingly appointed by the lower Court and his report is to the effect that the property as it is could not be conveniently divided but that if the dilapidated portion is demolished and dismantled, it might be capable of a convenient division. The learned City Civil Judge has, after due consideration of the report declined to allow the plaintiff to amend his plaint or withdraw the admission made before the Court by the next friend on 26th September 1947. The application, I.A. No. 1209 of 1947, was made after the defendant had applied for a sale under the Partition Act on 11th October 1947 and I am unable to say therefore that the Court below erred in declining to allow the plaintiff to give up the whole basis of his plaint and to go behind the admissions made before the Court and recorded by it. I therefore dismiss the civil revision petition with costs.

2. C.R.P. No. 651 of 1948. This civil revision petition is preferred against an order of the learned Judge of the City Civil Court, Madras, in I.A. No. 421 Of 1948 in O.S. No. 706 of 1946. In my judgment in C.R.P. No. 650 of 1948 I have briefly indicated the facts which have given rise to this litigation. The suit was, as already stated, one for partition, by a Mahomedan minor, of a certain house property, the defendant also being a minor entitled to a half share, The plaintiff prayed for a sale of the property and division of the proceeds inasmuch as the property was not capable of a convenient division by metes and bounds. On 11th October 1947, the defendant in the suit filed an application u/s 3 of the Partition Act for leave to buy the plaintiff's half share at a valuation to be fixed by the Court. Thereafter, the plaintiff applied for leave to withdraw the suit unconditionally, but the Court below has declined to allow the withdrawal. A plaintiff in a suit can withdraw his suit of his own accord without the permission of the Court. The only penalty attached to a withdrawal of the suit is that he is precluded from bringing a fresh suit on the same cause of action unless he obtains the leave of the Court for instituting a fresh suit under the provisions of Order 23, Rule I, Civil P.C. Normally speaking therefore, it is the right of a plaintiff to withdraw his suit without reference to the convenience of the defendant and without obtaining beforehand the permission of the Court. But there is a limit to the exercise of this right of withdrawal. If, for instance, in a suit for partition or in a suit for the taking of the accounts of a dissolved partnership, there has been a preliminary decree by which the rights of the parties have been fixed, then it is not open to the plaintiff to withdraw the suit thereafter and thereby seek to wipe off the effect of the adjudication rendered by the Court creating rights in the parties, Similarly, where in the course of a suit there has been a compromise arrived at between the parties with reference to the subject-matter of the litigation, it creates mutual rights and obligations between them and it is not open to the plaintiff, after such a compromise has been arrived at

with reference to the subject-matter of the suit, to withdraw the suit and thereby seek to nullify the compromise. Where, however, the rights of the parties had not assumed any definite shape either under a decree of Court or under a compromise entered into between them with reference to the subject-matter of the suit it seems to me that it is competent to the plaintiff to withdraw the suit and he cannot be forced to remain in the record at the instance of the defendant and prosecute the suit. In this case, the contention of Mr. Basheer Ahmed Sayeed, the learned advocate for the respondent, is that by reason of the concession made by the plaintiff both in the plaint and in the statement before the Court on 26th September 1947, his client, the defendant, had acquired an indefeasible right to purchase the share of the plaintiff at a valuation to be fixed by the Court and therefore the plaintiff cannot by withdrawing the suit deprive him of the right which has accrued to him under the provisions of the Partition Act. I would be inclined, to agree with this contention if the Court had made a valuation and made an order that the half share of the plaintiff should be conveyed to the defendant on the valuation determined by the Court. The stage now reached in this litigation is that the defendant has applied u/s 3 (1), Partition Act for, the appointment of a Commissioner for determining the valuation. The Commissioner has not yet determined the value. It may be that when the commissioner determines the value, the defendant may find the valuation so high that he cannot purchase the share of the plaintiff. It may also be that having regard to the fact that the defendant is a minor, the Court may not, u/s 5 of the Partition Act, sanction the purchase. It is no doubt true that an advantage has accrued to the defendant by reason of the admissions made in the plaint and by reason of the admission made before the Court as regards the impracticability of dividing the property. That, however, does not clothe the defendant with any enforceable right and does not prevent the plaintiff from exercising the right of a suitor to withdraw his suit. In these circumstances, I consider that the order of the lower Court is without jurisdiction and should be set aside; and I hold that it is open to the plaintiff at this stage to withdraw his suit. Having regard to the peculiar circumstances of the case, I make no order as to the costs of this civil revision petition.