

**(1977) 11 MAD CK 0028**

**In the Madras High Court**

**Case No :** Civil Miscellaneous Petition No. 13079 of 1977

S. Charles Samuel (died) and Others

APPELLANT

Vs

Board of Trustees Devaswom Board Office

RESPONDENT

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**Date of Decision :** 29-11-1977

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 1(2), Order 23 Rule 1(2), 151, 80  
Madras Transferred Territory Incorporated and Unincorporated Devaswoms Act, 1959  
— Section 34

**Citation :** (1978) ILR (Mad) 167

**Hon'ble Judges :** Balasubrahmanyam, J

**Bench :** Single Bench

**Advocate :** N. Thyagarajan, for P. Ananthakrishnan Nair, for the Appellant; O.K. Sridevi, for S. Padmanabhan, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

Balasubrahmanyam, J.—This Civil Miscellaneous Petition is for withdrawal of a suit with liberty to file a fresh suit. The matter falls to be considered under Order XXIII Rule, 1(2) of the Code of Civil Procedure, although the provision of law relied on in the petition is Section 151 of the Code.

2. The suit which the Petitioner wishes to withdraw was a suit filed by him against the Devaswom of a temple governed by the Madras (Transferred Territory) Incorporated and Unincorporated Devaswoms Act, 1959. (Madras Act XXX of 1959). This suit was not preceded by service of a suit notice on the Devaswom as stipulated in Section 34 of the Act. The Devaswom pleaded this Section in defence, and said that the suit against them was bad for want of notice. The Plaintiff apparently, wishes now to cure this defect by serving a proper notice on the Devaswom after withdrawing the present suit and then file a fresh suit after notice. The Petitioner's learned Counsel urges before me that absence of proper notice u/s 34 of the Act has to be regarded as a mere formal defect. On this basis, he urges that I should grant leave to him for withdrawal of

this suit with liberty to file a fresh suit against the Devaswom.

3. Order XXIII Rule, 1(2)(a) of the CPC does speak of a formal defect in a suit as providing a good ground for granting leave to the Plaintiff to withdraw his suit. But I do not see that what the present suit suffers from is a formal defect. The suit was not preceded by actual service of notice u/s 34 of Madras Act. XXX of 1959. I do not consider this provision as a formal provision, by any means. Cases have held that Section 80 of the Code of Civil Procedure, on which Section 34 of this Act is obviously modelled, has to be complied with by suitors in all cases, even in suits for injunction, and in the absence of such notice suits against the Government do not lie. This strict attitude of the Courts would be inexplicable, if suit notices u/s 80 of the Code were regarded as mere formalities.

4. But even assuming, for the limited purposes of Order XXIII, Rule 1(2)(a), that absence of a suit notice u/s 34 of the Act, or, for that matter, u/s 80 of the Code is a mere formal defect, it is not the law that on that account the Court must, as a matter of course and in every case, grant leave to the Plaintiff to withdraw his suit. On the contrary, as I understand Order XXIII, Rule (2), the grant of leave to withdraw a suit is always a matter for the discretion of the Court. Mark the expression may occurring in Rule 1(2). Clause (b) of the Rule says that the Court may allow a suit to be withdrawn, if it is satisfied that sufficient grounds exist therefore in the case. This clause does not say what grounds may be regarded as sufficient. It is in this context that Clause (a) and its specific reference to formal defects becomes clear. By enacting this clause, the legislature has only relieved the court from having to decide whether a formal defect can be a sufficient ground for exercising its discretion. But thereby the Legislature has not enacted a different rule for the exercise of the discretion itself. In my view, whether the Court is moved under Clause (a) or Clause (b) what is invoked for exercise is the Court's discretion.

5. Learned Counsel for the Petitioner cited before me number of reported cases. I do not regard them as precedents in the proper sense of the word, compelling me in this case to take one particular line rather than another. I just regard them as many illustrations of the different ways in which different Courts had exercised their discretion when dealing with motions for withdrawal, or suits under different circumstances.

6. Learned Counsel cited an unreported judgment of Varadarajan J., as a near authority. In that case, this very Devaswom was a party-Defendant and had opposed the withdrawal of the suit. The learned Judge over-ruled their objection and granted leave to the Plaintiff. Learned Counsel said that in that case too, the Plaintiff had wanted to cure the defect of absence of notice u/s 34 of the Act XXX of 1959.

7. When I say, and I think rightly, that Order XXIII, Rule 1(2) of the Code requires us, judges, to bring to bear our discretion to the case before us, I should be surrendering that discretion if I were to allow Varadarajan J., decision

in another case to influence my judgment in this. The case before that learned Judge might be similar to the present one, or even identical on facts. But, that does not prevent me from taking a different decision in this case, if I think that is right. To my mind it is this attribute of judicial discretion, namely, the latitude it gives to judges in decision-making, which makes it the precious commodity it is in our jurisprudence. And, mercifully, as I should think it provides the one limited area perhaps, in our judicial system in which past precedents are not allowed to hamstring the free and independent exercise of judicial minds.

8. I have dealt with these somewhat higher values only out of respect for learned Counsel's arguments. But I think the petition can be dismissed on a shorter and more pragmatic ground. The Defendant Davaswom had raised the point above want of notice u/s 34 even in its written statement. This might be said to have provided the appropriate time for the Plaintiff to have considered the question of withdrawal of his suit, that is to say, before the trial closed. But he chanced a decision on merits and went on with the trial. As it turned out, the trial Court's decree was in his favour, the learned Judge over-ruling the Devaswom's objection as to non-service of suit notice, on a finding of fact. But, on appeal the appellate Court, took a different view and dismissed the Plaintiff's suit. The Plaintiff has now filed a second appeal before this Court. The second appeal is actually on my list. And it is at this stage that the Plaintiff seeks for the withdrawal. He does not want to withdraw the second appeal, merely, He speaks for leave to withdraw his suit itself. The question is: Can he be allowed to do so, at this juncture at any rate?.

9. Learned Counsel for the Plaintiff says that there are cases in the books which show that a suit can be withdrawn even at the appellate stage. It seems to me, however, that even at the appellate stage, the way must be clear for the Plaintiff to withdraw his suit without prejudicially affecting the position of the other parties to the litigation. I can very well visualise a situation where the Plaintiff succeeds in the trial Court in obtaining a decree, and in the appeal against his decree by the Defendant the Plaintiff might wish to withdraw the suit, foregoing the decree on hand in his favour. If such a situation could be visualized, a withdrawal of the suit at the appeal stage, although it may amount to the withdrawal or nullification of the trial Court decree also, might still not hurt any party other than the withdrawing Plaintiff, exercise on the question of costs, for which the court may make suitable provision, or reservation in the order granting leave to withdraw. But the position in the present appeal is entirely different. Here is a case where the Defendant Devaswom had obtained a decree for dismissal of the suit. The dismissal of the suit is, no doubt, under contest in the second appeal filed by the Plaintiff. But the question is about the withdrawal of the suit itself. If the Plaintiff at this stage is allowed by this Court to withdraw his suit, that would have the effect of setting aside the decree under appeal. The Plaintiff's aim, of which, he has made no secret, is to withdraw this suit so that he may get over the objection of want of suit notice, a ground of defence of which the Devaswom has succeeded in getting the present suit dismissed. It

seems to me clear that to allow the Plaintiff to withdraw the suit in these circumstances, would not only destroy the existing decree in the Defendant's favour, but it would also effectively obliterate the presently available ground of defence on which the Devaswom has succeeded and has a right to succeed. I must, therefore, hold that the privilege of applying for withdrawal of suit under Order XXI If, Rule 1(2) should be held to be unavailable to the Plaintiff. In any event, the circumstances, which I have mentioned above constitute excellent grounds for not exercising my discretion in the Plaintiff's favour. For it would by now have been realised that what is here involved is no mere formal defect, incapable, of doing any harm to any one if it were removed.

10. On the contrary, formal defect or no formal defect, the grant of the Plaintiff's request would certainly amount to reversing the decree obtained by the Defendant without hearing the Defendant on merits. It would also tend to tilt the scales against the Defendant in any future litigation, if the Plaintiff were allowed the liberty.

11. For these reasons, I reject this civil miscellaneous petition. But I make no order as to costs.