

**Manbhari Vs. Sumer Chand**

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**Court :** Allahabad

**Decided On :** Mar-28-1914

**Reported in :** AIR1914All457; 25Ind.Cas.175

**Judge :** Rafique, J.

**Appellant :** Manbhari

**Respondent :** Sumer Chand

**Judgement :**

**Rafique, J.**

1. The facts which have given rise to the present application for revision are as follows: The plaintiff-respondent instituted a suit in the Court of the Munsif of Saharanpur for the recovery of certain, property on the allegation that he was the adopted son of the last owner of the property, viz., Niadar Mull. The allegation of adoption was denied on behalf of the defendant-applicant, who is the widow of the brother of Niadar Mull. Before the oral evidence was begun for the parties the plaintiff filed an application in the Court of the Munsif under Order XXLII, Rule 1, praying that he may be allowed to withdraw, his suit with leave to bring a fresh one. In his application the plaintiff stated that he had a right to succeed to the property of Niadar Mull, not only on the ground of adoption but on other grounds also. But as he thought adoption to be the strongest reason for succession he mentioned that only in his suit; but finding that the question of adoption had been

put in issue, it became necessary for him to withdraw the suit and mention all the grounds upon which he was entitled to succeed to the property of Niadar Mull, and in case he omitted to mention grounds other than adoption he was afraid that he would be debarred from seeking relief by another suit on their basis. The Pleader for the plaintiff, when, pressed to mention other grounds entitling his client to succeed to the property of Niadar Mull, mentioned one only, viz., that there was a Will in favour of his, client. No mention was made of the name of the testator but presumably the plaintiff meant the testator to be Niadar Mull. The learned Munsif, in spite of the objection of the defendant-applicant, granted the application and allowed the plaintiff-respondent to withdraw his suit, permitting him to bring a fresh one. The defendant has come up in revision to this Court. It is contended on her behalf that the learned Munsif has erred in allowing the plaintiff to withdraw his suit with leave to bring a fresh one. The application, dated July 31st, 1913, made on behalf of the plaintiff-respondent does not disclose any of the reasons mentioned under Order XXIII, Rule 1. The plaintiff had come into Court on the allegation that he was the adopted son of Niadar Mull and if that allegation was put in issue, he cannot make that as a grievance and ask the Court to allow him to withdraw his suit because the allegation, which was the basis of his claim was put into issue. It is further argued that the statement in the application, that the other grounds upon which the plaintiff, according to him, is entitled to succeed to the property of Niadar Mull cannot form a basis of another suit in 'case of the dismissal of the suit based on the allegation of adoption, is incorrect. For the plaintiff-respondent it is strenuously urged that this Court could and should interfere only for reasons given under Section 115 of Code of the Civil Procedure. In the present case the learned Munsif; had jurisdiction to entertain the application made by the plaintiff and has not exercised his jurisdiction with illegality or with material irregularity. I think that the application of the defendant must prevail. There is no doubt that on the revision side this Court must see that the order complained of has been passed either without jurisdiction or by omitting to exercise jurisdiction which was vested in the Court passing the order or had been passed illegally or with material irregularity. In the present case the order of the learned Munsif is challenged on the ground that it does not fall under either of the two reasons given in Order, XXIII, Rule 1. The omission by the plaintiff to include in his plaint all his causes of

action, which are inconsistent with each other, cannot be said to constitute a formal defect in the suit. The only ground upon which the order of the lower Court can be supported is the one given in Clause (b) of Order XXIII, Rule 1. Under the said clause, a Court can allow the plaintiff to withdraw his, suit with leave to bring a fresh one for sufficient grounds. In this case it does not appear to me that any sufficient ground was, made out before the learned Munsif, to enable him to permit the plaintiff to withdraw his suit. The omission of the mention of a Will said to have been executed by Niadar Mull in favour of the plaintiff, could, form the basis of a separate suit as the dismissal of the suit on the basis of adoption would not have operated as a bar. This is clear from the case of Subramania Chetti v. Anthinarayanan 7 M.L.J. 288. The application is, therefore, allowed with costs and the order of the Court below is set aside., The original suit of the plaintiff will proceed.

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