

HIGH COURT OF TRIPURA
A_G_A_R_T_A_L_A_
CRP No.59 of 2023

Sri Rathindra Chandra Das and another

..... Petitioner(s)

V E R S U S

Sri Barun Chandra Das and another

..... Respondent(s)

For Petitioner(s) : Mr. Soumendu Roy, Advocate,
Mr. R.K.P Singh, Advocate.

For Respondent(s) : Ms. R. Paul, Advocate.

HON'BLE THE CHIEF JUSTICE MR. APARESH KUMAR SINGH

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13.02.2024

Heard Mr. Soumendu Roy, learned counsel assisted by Mr. R.K.P Singh, learned counsel appearing for the petitioner and also heard Ms. R. Paul, learned counsel appearing for the respondents.

[2] Title Suit No.01 of 2023 instituted by the plaintiff/respondent herein before the Court of learned Judicial Magistrate, 1st Class, Kamalpur, Dhalai Judicial District suffered from want of pecuniary jurisdiction. Initially the plaintiff filed a petition under Order-VII, Rule-10-A read with Section 151 of CPC for return of the plaint. However, on 11.09.2023 when the case was fixed for hearing on that petition, an application Order XXIII, Rule-1 of CPC was filed by the plaintiff seeking leave of the Court to withdraw the suit with a liberty to file a fresh suit in the appropriate court of law. The learned Court vide impugned order dated 11.09.2023, allowed the plaintiff to withdraw the suit under Order XXIII, Rule-1 of CPC with a liberty to file a fresh suit in an appropriate court of law. Defendant being aggrieved has approached this Court in the present civil revision petition.

[3] Mr. Soumendu Roy, learned counsel for the petitioner submits that if the Court suffered from lack of jurisdiction on pecuniary grounds, the only option left before the Court was to return the plaint to be presented before the competent court in terms of Order-VII, Rule 10-A of CPC. However, learned trial Court committed an error of jurisdiction in ignoring the express provision of law Order-VII Rule 10-A and allowing the withdrawal of the suit with a liberty to file a fresh suit before the appropriate court of law. It is also stated that the plaintiff has after withdrawal of the suit filed a fresh suit before the learned Civil Judge (Senior Division), Court No.1, Ambassa, Dhalai, Tripura with an improved pleadings. The impugned order, therefore, suffers from jurisdictional error and is fit to be set aside. The plaintiff cannot be allowed to improve his case after withdrawal of the suit which suffered from lack of pecuniary jurisdiction before the Court of learned Judicial Magistrate, 1st Class, Kamalpur, Dhalai Judicial District.

[4] Learned counsel for the respondents submits that no vested right was created in favour of the defendant which could be upset because of withdrawal of the suit with a liberty to file a fresh suit under Order XXIII, Rule 1 read with Rule 3 of CPC. It is submitted that Order XXIII Rule 1 clearly indicates that the suit can be withdrawn any time after the institution and Rule 3 thereof provides that if the court is satisfied that the suit must fail by reason of some formal defects, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from the said suit and institute a fresh suit in respect of the subject matter of such suit or such part of the claim. It is open for the defendant to object to the fresh suit filed before the Court of

Civil Judge, Senior Division, Ambassa by written statement. Such contentions whether the plaintiff had improved his cause of action or changed the subject matter of the suit are well within the capacity of the defendant to be raised in the written statement to be filed before the concerned court. Therefore, there is no error in the impugned order which warrants interference under Article 227 of the Constitution of India.

[5] I have considered the submissions of learned counsel for the parties and taken note of the relevant material facts placed from the record. I have also gone through the impugned order. Order VII Rule 10-A is extracted hereunder:

“[10-A. Power of Court to fix a date of appearance in the Court where plaint is to be filed after its return.-(1) Where, in any suit, after the defendant has appeared, the Court is of the opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff.”

(2) Where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court-

(a) specifying the Court in which he proposes to present the plaint after its return,

(b) praying that the Court may fix a date for the appearance of the parties in the said Court, and

(c) requesting that the notice of the date so fixed may be given to him and to the defendant.

(3) Where an application is made by the plaintiff under sub-rule (2), the Court shall, before returning the plaint and notwithstanding that the order for return of plaint was made by it on the ground that it has no jurisdiction to try the suit,-

(a) fix a date for the appearance of the parties in the Court in which the plaint is proposed to be presented, and

(b) give to the plaintiff and to the defendant notice of such date for appearance.

(4) Where the notice of the date for appearance is given under sub-rule (3),-

(a) it shall not be necessary for the Court in which the plaint is presented after its return, to serve the defendant with a summons for appearance in the suit, unless that Court, for reasons to be recorded otherwise directs, and

(b) the said notice shall be deemed to be a summons for the appearance of the defendant in the Court in which the plaint is presented on the date so fixed by the Court by which the plaint was returned.

(5) Where the application made by the plaintiff under sub-rule (2) is allowed by the Court, the plaintiff shall not be entitled to appeal against the order returning the plaint.

It provides that in any suit after the defendant has appeared, if the court is of the opinion that the plaint should be returned, it shall, before doing so, intimate its decision to the plaintiff and where an intimation is given to the plaintiff under sub-rule (1), the plaintiff may make an application to the Court specifying (a) the Court in which he proposes to present the plaint after its return (b) praying that the Court may fix a date for the appearance of the parties in the said Court and (c) requesting that the notice of the date so fixed may be given to him and to the defendant. When such an application is made by the plaintiff under sub-rule (2), the Court before returning the plaint and notwithstanding that the order of return of plaint was made on the ground that it had no jurisdiction to try the suit (a) fix a date for appearance of the parties in the Court in which the plaint is proposed to be presented and (b) give the plaintiff and to the defendant notice of such date for appearance.

[6] In the present case, as it appears from perusal of the impugned order, the decision of the learned Court on Order VII Rule 10-A of CPC had not been taken. Instead the plaintiff filed an application under Order XXIII Rule 1 of CPC seeking permission to withdraw the suit with a liberty to file a fresh suit in an appropriate court of law. The suit obviously had not commenced as neither written statement was filed by the defendant/petitioner herein nor any issues were framed. In that way, no

vested right had been created in favour of the defendant. In this regard, it is apposite to refer to the decision of the Apex Court in case of *Sneh Gupta versus Devi Sarup and others*, reported in (2009) 6 SCC 194. The Apex Court at paragraph 33 and 35 of the judgment has laid down that the right to withdraw a suit is hedged with a pre-condition that it cannot be withdrawn by a party after it acquires a privilege. Right to withdraw a suit of the party bringing the suit would be unqualified, if no right has been vested in any other party.

[7] Order XXIII, Rule (1) of CPC is also extracted hereunder as a direct application to the case at hand :

1. Withdrawal of suit or abandonment of part of claim.

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other persons.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject- matter of such suit or such part of the claim.

(4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

Under Order XXIII, Rule (1), a plaintiff can at any time after the institution of the suit make an application as against all or any of the defendants to abandon his suit or abandon a part of his claim. On such an application being made the Court under sub-rule (3) has to be satisfied that (a) the suit must fail by reason of some formal defect, or (b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim; in such an events, it may on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

[8] What is a “formal defect” has been explained by the Apex Court in a recent decision rendered in case of *V. Rajendran and another versus Annasamy Pandian (Dead) through Legal representatives Karphyayani Natchiar* reported in (2017) 5 SCC 63 wherein it was held as under:

“10. In *K.S. Bhoopathy and Ors. vs. Kokila and Ors.* (2000) 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or “sufficient grounds”, such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order XXIII Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to

disclose a cause of action etc. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

“Formal defect” has been described as a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action etc. As held hereinabove by the Apex Court “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties. Evidently, lack of pecuniary jurisdiction in the instant case did not affect the merits of the case of either of the parties rather it would fall within the meaning of formal defect as provided under Order XXIII Rule 3(a). Since the trial had not even commenced and the lack of pecuniary jurisdiction was pointed out to the learned trial Court at the very outset, the plaintiff had an option either to seek return of the plaint to be presented before the concerned court or to seek withdrawal of the suit with a liberty to file a fresh suit after curing the defect.

[9] Learned trial Court on being satisfied with the prayer, allowed the plaintiff to withdraw the suit with a liberty to file it before the competent court of law. The contention of the petitioner that such a course was impermissible does not merit acceptance for the reason that suit had neither commenced and moreover, no right had been vested in the other party i.e. the defendant. If the plaintiff has made improvisation in the fresh suit filed before the court of learned Civil Judge, Senior Division, Ambassa it is for the defendant i.e. the petitioner herein to take all objections as permissible in

law before the said court. However, the impugned order does not appear to suffer from any lack of jurisdiction or error touching jurisdiction which requires interference by this Court.

[10] Accordingly, the instant civil revision petition is dismissed.

Pending application(s), if any, also stands disposed of.

(APARESH KUMAR SINGH) CJ

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