

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.299 of 2015

ORDER:

This Civil Revision Petition is filed challenging the order dt.04-12-2014 in I.A.No.769 of 2014 in O.S.No.171 of 2012 of the

III Addl. Junior Civil Judge, Kadapa.

2. The petitioner herein is defendant in the suit. The respondent/plaintiff filed the suit for a perpetual injunction restraining the petitioner from interfering with her peaceful possession and enjoyment over the plaint schedule property and for costs.

3. The defendant filed written statement denying the possession and title of plaintiff in respect of the property. He also raised other grounds.

4. Issues were framed, trial commenced and the matter was posted for evidence on defendant side.

5. At that stage, the respondent/plaintiff filed I.A.No.769 of 2014 under Order XXIII Rule 1 r/w Section 151 CPC praying the Court to permit the petitioner to withdraw the suit with liberty to file a fresh comprehensive suit with appropriate relief.

6. In the affidavit filed in support of the said application, it is stated that after closure of the evidence of

plaintiff, the petitioner/defendant highhandedly entered into the plaint schedule property during the absence of plaintiff and enclosed the suit schedule property with fencing; that the plaintiff was advised by her Advocate to file a suit for declaration of title by withdrawing the present suit and also seek for recovery of possession; and therefore, this application is filed.

7. Counter affidavit was filed to this application contending that the suit was filed in 2012 and it was dragged for more than 2 years and now the present application is filed. It was contended that the affidavit filed by petitioner is vague and is not in accordance with Order XXIII Rule 1 CPC. It was also contended that the defect claimed by petitioner is not a defect as contemplated under Order XXIII Rule 1 CPC and the present application, therefore, is not maintainable and that the intention of petitioner is only to avoid her admissions in the plaint, and this is impermissible in law.

8. By order dt.04-12-2014, the Court below allowed I.A.No.769 of 2014 on payment of costs of Rs.3,000/- payable by respondent to petitioner by 10-12-2014. It held that the respondent/defendant is alleged to have encroached into the plaint schedule property taking advantage of petitioner's absence after closure of plaintiff's evidence and that if this fact is true, then suit for mere injunction is not maintainable and plaintiff has necessarily to

seek relief of declaration and recovery of possession. It held that it was satisfied that it is a fit case for allowing of the application under Order XXIII Rule 1 CPC notwithstanding the objections raised by petitioner, who could be adequately compensated by payment of costs.

9. Questioning the same, this Revision is filed.

10. The learned counsel for petitioner had contended that the Court below erred in passing the impugned order; that the cause of action for the relief of perpetual injunction is different from the cause of action for declaration of title and recovery of possession and that it is impermissible to permit the respondent to withdraw this suit and file a fresh suit. He also contended that the provision of Order XXIII Rule 1(3) CPC cannot be allowed to be invoked by respondent since she had failed to conduct her case with due care and diligence and only to avoid unfavourable finding against her, she is seeking for denovo trial and for fresh adjudication by filing a fresh suit. He also stated that in the written statement itself the petitioner had alleged that he was in possession of the property and that the allegation of the respondent/plaintiff that in her absence, the petitioner occupied the plaint schedule property and fenced it, is false.

11. I have noted the submissions of both sides.

12. Order XXIII Rule 1(3) CPC permits a suit to be withdrawn by a plaintiff if the Court is satisfied (a) that a suit

must fail by reason of some formal defect, or (b) if there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter or a suit for part of a claim and then permit the plaintiff to withdraw the suit with liberty to institute a fresh suit in respect of subject matter of such suit or such part of the claim.

13. In the present case, the plaintiff had filed the suit alleging that she was in possession of the plaint schedule property and sought for the relief of perpetual injunction. The defendant had taken a plea that he is in possession of the plaint schedule property. According to plaintiff, after her evidence was closed, the defendant encroached into the plaint schedule property in her absence and then enclosed it with fencing. Thus, plaintiff has stated that she is no longer in possession since she was dispossessed by defendant pending suit. Having realized that her suit for perpetual injunction may not succeed in view of the fact that she not in possession of property, the plaintiff had 2 options, i.e. (i) to seek amendment of the plaint under Order VI Rule 17 CPC by substituting the relief of prohibitory injunction with relief of recovery of possession on the ground of dispossession pending suit or (ii) to withdraw the suit with liberty to file a fresh suit seeking reliefs of declaration of title and recovery of possession.

14. In **Sampath Kumar Vs. Ayyakannu and Anr.**^[1], the Supreme Court held that an amendment of this

nature by substituting the relief of recovery of possession in the place of relief of perpetual injunction would not alter the basic structure of the suit and it only amounts to a change in the nature of relief sought for by the plaintiff; that not only can plaintiff file a fresh suit, but also he can seek amendment of plaint to avoid multiplicity of proceedings. It also observed that plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of permanent prohibitory injunction and which is pending; and there is nothing wrong in the plaintiff seeking to amend the plaint by seeking the relief of declaration of title and recovery of possession in such pending suit in order to avoid multiplicity of proceedings. The ratio laid down therein clearly applies to present case.

15. This is not a case where the suit is being withdrawn on the ground that it suffers from a formal defect (for example non-issuance of notice under Section 80 CPC). Even if sub-rule (a) of Order XXIII Rule 1(iii) CPC may not be attracted, still sub-rule (b) thereof would certainly apply and the plaintiff is at liberty to withdraw the suit and file a fresh suit. No prejudice would be caused to petitioner if such a course is adopted because petitioner would have the opportunity to contest the fresh suit also; and for having had to contest the suit which is now withdrawn, he has been adequately compensated by award of costs of Rs.3,000/-.

Therefore, I do not find any merit in the contentions of the learned counsel for petitioner.

16. Accordingly, the Civil Revision Petition is dismissed at the stage of admission. No costs.

17. As a sequel, all miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 19-02-2015

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[\[1\]](#) AIR 2002 SC 3369