

THE HON'BLE SRI JUSTICE A.V. SESA SAI

C.R.P. No.2203 of 2014

ORDER:

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The plaintiffs in O.S.No.44 of 2003 on the file of the Court of the Senior Civil Judge, Karimnagar, are the petitioners in the present revision, presented under Article 227 of the Constitution of India. This revision assails the order of the said Court, dismissing I.A.No.776 of 2013 filed by the petitioners herein under the provisions of Order XXIII Rule 1(2) of C.P.C.

2. The facts and circumstances, in nutshell, leading to the filing of the present revision, are as infra:

3. The petitioners herein instituted O.S.No.44 of 2003 against the respondents herein for perpetual injunction in respect of the plaint schedule property of Ac.7.00 guntas situated in Sy.No.291/B of Arepalli Revenue Village, Theegalaguttapalli, Karimnagar District. When the suit was coming up for cross-examination of PW-1, the petitioners herein filed the present I.A.No.776 of 2013 under Order XXIII Rule 1(2) of C.P.C., seeking permission of the Court below to withdraw the suit with liberty to file a fresh suit for declaration of title and recovery of possession in respect of the suit land. Resisting and opposing the said application, the 1st defendant/1st respondent herein filed a counter. The learned Senior Civil Judge, by way of an order dated 07-02-2014, dismissed the said application.

4. Calling in question the validity and the legal sustainability of the

said order, the present revision has been filed.

5. Heard Sri A. Suryanarayana, learned counsel for the petitioners and Sri P. V. Narayana Rao, learned counsel for the 1st respondent, apart from perusing the material available before the Court.

6. Contentions/submissions of the learned counsel for the petitioners:

- i) The order impugned is erroneous, contrary to law and opposed to the very spirit and object of the provisions of Order XXIII Rule 1(2) of C.P.C.
- ii) The order under challenge is completely devoid of any valid and convincing reasons.
- iii) Had the averments in the affidavit filed in support of the application been considered by the Court below, the order under challenge would not have emanated.
- iv) Since the case made out by the petitioners falls under the provisions of Order XXIII Rule 1(3)(a) of C.P.C, the Court below ought to have permitted the petitioners to withdraw the suit with a liberty, as prayed for.
- v) The liberty sought by the petitioners would never cause any prejudice to the petitioners, as such the dismissal of the application is unreasonable.
- vi) In view of the events, which took place pending the suit, i.e. removal of boundary stones and occupation of the part of the suit land, the learned Judge ought to have allowed the application otherwise the very suit would become redundant.

7. In support of his submissions and contentions, the learned counsel for the petitioners relies on the judgment of this Court in **Telugu Chinna Thirupathaiah v. Boya Nadipi**^[1].

8. Contentions/submissions of the learned counsel for the respondent No.1.

- i) The order under challenge is in accordance with Order XXIII of C.P.C., and there is no illegality nor any material infirmity in the impugned order and in the absence of the same, the present revision is not maintainable under Article 227 of the Constitution of India.
- ii) There are absolutely no ingredients of Order XXIII Rule 1 of C.P.C., as such the learned Senior Civil Judge is perfectly justified in dismissing the application filed by the petitioners in this revision.
- iii) The petitioners herein did not assign any proper and valid reasons for filing the application after the delay of 10 years, and the application is a belated one, and absolutely the application is devoid of *bona fides*.
- iv) The judgment on which the learned counsel for the petitioners places reliance, has absolutely no relevance to the facts and circumstances of the present case.

9. To bolster his submissions and contentions, learned counsel for the respondent relies on the judgments in **Gopireddy Prabhakar**

Reddy v. Gopireddy Suryanarayana Reddy^[2], Somalraju Chinnammi v. Samanthu Sivaji Ganesh and another^[3], T. G. Varadarajulu Naidu and others v. K.G. Narayanaswami Naidu^[4], and Naimathulla Khan Sahib and others v. Abdul Razack Sahib^[5].

10. In the above background, now the issues, that emerge for consideration of this Court; are,

- i) Whether the order under challenge is in conformity with the provisions of Order XXIII of C.P.C., and
- ii) whether the impugned order warrants any correction by this Court, under Article 227 of the Constitution of India.

11. The provision of law, which is germane and relevant for the purpose of adjudication of the issue, in the present revision, is, Order XXIII of C.P.C. It reads as under:

“O.XXIII R.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 person.

(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 precluded 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.”

12. The primary object of Order XXIII C.P.C. is to allow the plaintiff to exercise his right to proceed with the litigation in his own way, and also to ensure fair disposal on merits. Sub-Rule (1) of Order XXIII C.P.C., confers absolute and unqualified right on the plaintiff to abandon his suit or part of the claim with liberty to file fresh suit on the same subject-matter and the suit or part of the claim on such abandonment, comes to an end for ever. Sub Rule 3 of Rule 1 of Order XXIII C.P.C. is an exception to the common law doctrine of non

suit. When the Court is of the opinion and satisfied that there is a formal defect in the constitution and framing of the suit, and when there are sufficient grounds for allowing the plaintiff, to withdraw the suit, with liberty to file fresh suit on the same cause of action, the Court may grant leave to withdraw the suit, with such permission to file a fresh suit. The defects, as stipulated, shall be in the nature of formal or procedural, and shall not be in the form of substance or on merits. The purpose of Rule 1 (3) of Order XXIII C.P.C., is to prevent the defeat of justice on technical ground, but not to allow the plaintiff to have second innings after his failure to conduct his case with due care and diligence and to avoid unfavourable findings against him. Such permission, as stipulated, shall not cause any serious prejudice to the opposite party.

Such permission should not result in wastage of public time of Courts, and unnecessary expenses to the parties, and the grant of leave, as envisaged by Sub-Rule (3) of Rule 1 of Order XXIII C.P.C., is in the discretion of the Court and the said power is required to be exercised with care, caution and circumspection, and at the same time, it is also the obligation of the Court to prevent the abuse of process of law, as the object behind this provision is based on public policy. It is also a settled law that the formal defect, as stipulated under the provision is only a defect of form, prescribed by Rules or procedure, but not an aspect, touching the merits of the matter. Apprehension of failure of suit and any defect going to the root of the matter is not a ground for granting permission. Addition of new plea based on new facts is also not a ground for permission.

13. The issue in the present case is required to be tested and examined in the light of the above aspects and the settled proposition

of law. According to the petitioners, the suit filed by them was dismissed for default on 01-07-2008, and they filed I.A.No.560 of 2009, and pending the said I.A., on 10-01-2013, defendants 1 and 2, taking advantage of non-restoration of the suit, removed the boundary stones by separating two survey numbers i.e. 291/A and 291/B and tried to encroach into the suit land, to an extent of Ac.1.04 guntas by fixing boundary line, and immediately, they reported the same to the Station House Officer, Karimnagar Rural Police Station, Karimnagar. According to the petitioners, the Police failed to take any action against defendants 1 and 2. It is also their case that earlier the entire history of the case was not properly mentioned, and without mentioning the boundaries properly, the suit was instituted.

14. On the contrary, it is the case of the respondents that they filed I.A.No.1102 of 2003 for appointment of Advocate Commissioner, who submitted a report on 29-10-2003, stating that there is Ridge separating their land with the land of the plaintiffs, as such the question of illegally occupying Ac.1.04 guntas would not arise. It is also their case that the present application filed after 10 years, does not require any consideration.

15. Coming to the judgment cited by the learned counsel for the petitioners. In **Telugu Chinna Thirupathaiah v. Boya Nadipi** (1 supra), this Court at paragraph 7 held as follows:

“7. Whenever an application for permission to withdraw the suit with permission to file a fresh suit is considered by the Court, it shall keep in mind whether the plaintiff has satisfied either of the two conditions referred to in Order XXIII Rule (3)(a) and (b) CPC. The Court cannot go into the merits of the plea on which the plaintiff seeks to file a fresh suit or it cannot insist on proving such plea in the

present suit itself. It is for the plaintiff to establish his case by adducing relevant evidence in a freshly instituted case. All that the Court needs to be satisfied is that whether the suit suffers from formal defect or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit.”

16. Coming to the judgments cited by the learned counsel for the 1st respondent. In **Gopireddy Prabhakar Reddy v. Gopireddy Suryanarayana Reddy** (2 supra), this Court at paragraphs 4 and 5 held as under:

“4. It is not the pleaded case of the petitioner that the suit suffers from formal defect as envisaged under sub-clause (a) reproduced above. In order to fall under sub-clause (b), the petitioner must satisfy the Court that sufficient grounds exist for allowing him to institute a fresh suit. The petitioner failed to explain as to why in the first place he has not filed the suit for declaration of title and, having filed a suit for injunction simplicitor, why he had to wait till cross-examination of DW.1 was completed. While the reason put forth by the petitioner that with a view to file a comprehensive suit for inclusion of the prayer of declaration of title, he wants to withdraw the suit, may superficially appear to be appealing, if such pleas are accepted during the midst of the trial, more often the plaintiffs would try to find an easy way out to wriggle out of the tight situations wherever they find the going tough during the trial, by coming out with such applications. If a liberal approach in giving such permissions is displayed by the Courts, there is a likelihood of the defendant suffering the litigation endlessly. Therefore, whenever requests for withdrawal of the suits after commencement of the trial are made, the Courts need to examine such requests with due care and caution and unless the Court is fully satisfied that sufficient reasons exist for granting such permission, such applications shall not be allowed.

5. On the facts of the present case, if the petitioner felt that by inadvertence or wrong advice, he did not include the prayer of declaration of title in the plaint, the appropriate course for him should have been to file an application for

amendment of the plaint. The petitioner has not made any such effort in the first place. Having waited till the cross-examination of DW.1 was completed, the petitioner has filed the application for withdrawal of the suit. In this fact situation, I do not find any bonafides in the request of the petitioner for withdrawal of the suit with liberty to file a fresh suit and the lower Court has rightly dismissed the application.”

17. In **Somalraju Chinnammi v. Samanthu Sivaji Ganesh and another** (3 supra), this Court at paragraphs 8 to 11 held as under:

“8. The expression ‘Formal Defect’ in the normal parlance connotes defects of various kinds not affecting the merits of the case. Thus, a formal defect is ‘a defect of form’ unrelated to the claim of the plaintiff on merits.

9. It is also relevant to note that under Order 23 Rule 1(3) of C.P.C. for granting permission to institute a fresh suit on the same cause of action the satisfaction of the Court that the suit must fail by reason of some formal defect is mandatory. Hence, it is essential for the plaintiff while seeking leave of the Court under Order 23 Rule 1(3) of C.P.C. to establish that the formal defects in the suit are likely to lead to dismissal of his suit. Thereupon if the Court is satisfied that the suit must fail by reason of such formal defects then only the plaintiff can be permitted to withdraw his suit with liberty to file a subsequent suit in respect of the same subject-matter.

10. In the circumstances, the mere repetition of the expression ‘formal defect’ is not sufficient to grant the permission as contemplated under sub-rule (3) of Rule 23(1). What is the formal defect, according to the plaintiff, must be specified and if the Court is satisfied that the suit must fail by reason of such formal defect the leave can be granted pointing out such formal defect.

11. Since admittedly the plaintiff in the instant case failed to specify the so-called formal defect, the Court below was unable to record its satisfaction that the suit would fail by reason of the formal defect. Therefore, the Court below was justified in dismissing the petitioner’s application under Order 23 Rule 1(3) of C.P.C.”

18. In **T. G. Varadarajulu Naidu and others v. K.G.**

Narayanaswami Naidu (4 supra), the Madras High Court held as under:

“[2] Order 23, R. permits the Court to grant liberty to institute a fresh suit with regard to the same subject-matter provided:

“(a) that a suit must fail by reason of some formal defect, or (b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim.”

It has been laid down that (b) must be read as *ejusdem generis* with (a). There must be something in the nature of a formal defect before permission can be granted to file a fresh suit on the same cause of action. The learned Subordinate Judge’s order is a very brief one; the relevant portion of which is:

“The plaintiffs contended that they (plaintiffs) should seek a decision on these questions (questions raised in the written statement) in a properly instituted suit.....I would grant them the permission sought.”

Nothing is said in this order about the existence of any formal defect, and there does not in fact seem to be any formal defect. It may be desirable that some of the questions raised in the written statement, which were not strictly speaking a part of the suit as framed by the plaintiffs, might be considered in the suit; and some foundation for the consideration of subsidiary points is found in para 11 of the plaint. The learned Judge had, however, no jurisdiction because of this to grant the plaintiffs liberty to file a fresh suit on the same cause of action. The proper method of securing the wider consideration of the matters raised was by the amendment of the plaint...”

19. In the instant case, the petitioners herein filed the present application, when admittedly the suit was posted for cross-examination of PW-1. It is also significant to note that the issues in the suit were framed on 29-10-2003, and a number of opportunities were given to the petitioners to adduce evidence, by imposing costs, and eventually, the suit was dismissed for non-prosecution

on 01-07-2008, and later, the suit was restored on the application filed by the petitioners. It is also significant to note that the Commissioner, who was appointed on the application filed by the petitioners, submitted the report, highlighting the aspect of existence of ridge, dividing the lands of the plaintiffs and the defendants.

20. A perusal of the order passed by the Court below shows that the learned Judge meticulously and thoroughly considered the scope and ambit of the provisions of Order XXIII Rule 1 C.P.C.

While assigning cogent and convincing reasons, and dismissed the application filed by the petitioners herein.

The defects pointed out by the petitioners are neither formal, nor the same constitute the ground under Order XXIII of C.P.C.

The averments made in the affidavit, at the best, may constitute a ground for filing an application under Order VI Rule 17, but not under Order XXIII C.P.C. By any stretch of imagination, the case of the petitioners does not attract the provisions of Order XXIII of C.P.C.

21. The Court below, in the facts and circumstances of the case, is perfectly justified in holding that the application is belated. It is a settled proposition of law that unless the order impugned suffers from fundamental infirmity, foundational defect, or jurisdictional error, invocation of the provisions of Article 227 of the Constitution of India is impermissible.

22. For the aforesaid reasons, the revision is dismissed. The miscellaneous petitions, if any, shall also stand dismissed.

23. There shall be no order as to costs.

Dt.20-02-2015.

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[1] 2013 (4) ALD 814
[2] 2013(1) ALT 56
[3] 2008 (6) ALD 485
[4] AIR 1950 Madras 40
[5] AIR 1925 Madras 268