

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Civil Revision No.106 of 2014

1. Bisahin Bai, Wd/o Late Sharda Prasad Sahu, aged about 58 years,
2. Savita Kumari, D/o Late Sharda Prasad Sahu, aged about 31 years,
3. Dev Kumar, S/o Late Sharda Prasad Sahu, aged about 29 years, all are R/o Baroda Chowk, Mahasamund, Tahsil & Distt. Mahasamund (C.G.).

(Plaintiffs)
---- Petitioners

Versus

1. Sandhya Rani, Wd/o Late Loknath Sahu, aged 48 years,
2. Labhashi Sahu, D/o Late Loknath Sahu, aged about 25 years,
3. Lalsha Sahu, D/o Late Loknath Sahu, aged about 23 years.
4. Lohit Sahu, S/o Late Loknath Sahu, aged about 22 years.
5. Lokshakti Sahu, S/o Late Loknath Sahu, aged about 19 years, All are R/o ward No.10, Mahasamund, Tahsil & Distt. Mahasamund (C.G.)
6. State of Chhattisgarh, through the Collector, Mahasamund, Distt. Mahasamund (C.G.)

(Defendants)
---- Respondents

For Petitioners:	Mr. R.S. Patel, Advocate.
For Respondents No.1 to 5:	Mr. B.P. Sharma and Mr. Hari Agrawal, Advocates.
For State/Respondent No.6:	Mr. Om P. Sahu, Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

01/09/2016

1. Plaintiffs Bisahin Bai, Savita Kumari and Dev Kumar filed a suit for declaration of title and permanent injunction seeking relief that they being the successors of Sharda Prasad Sahu are entitled for entire property of Sharda Prasad Sahu and in alternative, prayed for $\frac{3}{4}$ share in the suit property and also sought partition and permanent injunction. Present defendants opposed the suit and filed their written statement in which the trial Court has framed four issues on 29-6-2010. The main issue is with regard to title of parties on the suit land and mutation by the defendants over the suit land. During the pendency of suit, the plaintiffs preferred an application under Order 23 Rule 1(3)(a) of the CPC stating inter alia that there is a formal defect in the suit as necessary party has not been impleaded in the suit and therefore the application be allowed and the plaintiffs be permitted to withdraw the suit with liberty to file afresh which was replied by the defendants. Ultimately, by the impugned order, the trial Court partly allowed the application and dismissed the suit as withdrawn, however, declined to grant liberty to file fresh suit for the subject matter of suit. Feeling aggrieved against the order partly allowing and partly rejecting the application, the instant revision has been filed.
2. Mr. R.S. Patel, learned counsel for the petitioners/plaintiffs, would submit that the order passed by the trial Court permitting the suit to be withdrawn without granting liberty to

file fresh suit is unsustainable in law as no liberty was granted to file fresh suit and by granting application, the suit has been withdrawn thereby the plaintiffs were deprived to continue the suit. Therefore, the order of the trial Court is unsustainable in law. He would further submit that even the suit suffers from formal defect and therefore the trial Court ought to have granted permission and would have permitted the suit to be withdrawn with liberty to file a fresh one. In absence of such order, the present petitioners / plaintiffs have been deprived of the justice for which they have filed a civil suit and against which they have preferred this revision under Section 115 of the CPC for exercise of revisional jurisdiction.

3. On the other hand, Mr. B.P. Sharma, learned counsel for respondents No.1 to 5 / defendants, vehemently opposing the submission of learned counsel for the petitioners would submit that such a course has rightly been adopted by the trial Court as the suit filed by the plaintiffs does not suffer from any formal defect. He would further submit that the plaintiffs were granted repeated opportunities to adduce evidence and since the plaintiffs could not adduce evidence and as a pretext of seeking further time and to make their suit better, such an application has been made. Even no issue with regard to formal defect has been framed by the trial Court and it has not been put to trial. Therefore, the

trial Court is absolutely justified in partly allowing the application and partly rejecting the application.

4. In order to consider the plea raised at the Bar, it would be appropriate to notice Order 23 Rule 1(3) of the CPC which reads as under: -

“Order XXIII Rule 1. Withdrawal of suit or abandonment of part of claim.—

(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.”

5. A close, careful and critical reading of the above-stated provision would show that where the Court is satisfied either on the ground that a suit must fail by reason of some formal defect, or 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, the application may be granted by the trial Court with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. The aforesaid provision confers no power and no jurisdiction to the Court to simply permit the plaintiff to withdraw his suit as the power conferred by the provisions contained in Order 23

Rule 1 of the CPC has to be exercised on fulfillment of certain conditions mentioned in Order 23 Rule 1(3) (a) & (b). If the condition precedent for exercise of power for withdrawal of suit is not satisfied, the Court would not exercise that power of dismissing the suit without liberty.

6. The Supreme Court in the matter of **K.S. Bhoopathy and others v. Kokila and others**¹ noticed the provisions contained in Order 23 Rule 1(1) and Order 23 Rule 1(3) of the CPC and held that the present Rule which was introduced in place of the old Rule 1 by the Amendment Act of 1976 makes a distinction between absolute withdrawal which is termed as “abandonment” and withdrawal with the permission of the court, and further held that this clear distinction is maintained throughout in the substituted Rule by making appropriate changes in the wording of various sub-rules of Rule 1. The Supreme Court observed in paragraph 13 as under: -

“13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court

¹ (2000) 5 SCC 458

with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action.”

7. In view of the aforesaid distinction which is apparent from Order 23 Rules 1(1) and 1(3) of the CPC and which has been clearly held so by the Supreme Court in **K.S. Bhoopathy** (supra), it would be apparent that the plaintiffs made an application under Order 23 Rule 1(3), rather Rule 1(3)(a), of the CPC and it was not an application for bare withdrawal of the suit under Order 23 Rule 1(1) of the CPC, it was an application for withdrawal of the suit with liberty to file a fresh suit under Order 23 Rule 1(3) of the CPC on the same cause of action. In the considered opinion of this Court, the trial Court cannot only direct withdrawal of suit without giving the liberty sought for in such an application. If the Court disallows the liberty sought for it should dismiss the application and allow the suit to proceed, as the

plaintiffs' application was clearly not an application for withdrawal simpliciter, but it was an application for withdrawal with liberty to file a fresh suit on same cause of action under Order 23 Rule 1(3)(a) of the CPC.

8. The M.P. High Court in the matter of **Bhushan v. Bala Prasad**² taking into consideration the earlier decisions in the matters of **Shaikh A. Kadar and others v. Jose Camilo Gomes and others**³, **Devidas Tulsiram Brijwani v. The Commissioner Poona Municipal Corpn.**⁴, **Khivaraj Chhagniram Zavar and another v. Shivshankar Basappa Lingashetty and another**⁵ and **Hans Raj Akrot v. State of Himachal Pradesh**⁶, has clearly come to the conclusion that the Court cannot split the prayer for withdrawal of the suit with permission to file a fresh suit and the Court cannot split the prayer and allow only to withdraw the suit refusing liberty to file fresh suit.
9. Similar proposition has been laid down in the matters of **T.W. Ranganathan v. T.K. Subramaniam and others**⁷ and **Bhutha v. Baburao**⁸ though they have dealt with Order 23 Rule 1 (unamended) of the CPC.

10. Apart from this, the plaintiffs have filed the suit way back on

2 2007(3) M.P.H.T. 338

3 AIR 1982 Goa Daman and Diu

4 AIR 1974 Bombay 39

5 AIR 1974 Bombay 4

6 AIR 1989 Himachal Pradesh 43

7 AIR 1971 Madras 477

8 AIR 1975 Karnataka 101

15-1-2010 in which issues have been framed by the trial Court on 29-6-2010. A careful perusal of the issues will show that three main issues have been framed and they relate to title of the plaintiffs, mutation of the defendants over the suit land and the capacity in which the defendants are residing in the suit premises. There is no such issue with regard to any defect in the suit which goes to the root of the matter. Therefore, there is no such formal defect in the suit and it has rightly been recorded by the trial Court that the suit does not suffer from any defect which entitled the plaintiffs to make an application for withdrawal of the suit with liberty to file afresh. In the circumstances, the trial Court has no occasion to allow the application if the suit does not suffer from any formal defect or there is no sufficient ground for allowing the application and to institute fresh subject-matter. Virtually, the Court could have rejected the application and allowed the suit to proceed further. Therefore, I am of the considered opinion that the trial Court is absolutely unjustified in partly allowing the application without granting permission to file fresh suit.

11. In view of the aforesaid, the impugned order dated 1-3-2011 passed by the 1st Civil Judge Class-I, Mahasamund, in Civil Suit No.7A/2010, is set aside and the revision is allowed. The civil suit is hereby restored to its original number.

12. Consequently, it is directed that the trial Court would proceed with the civil suit as it is, in accordance with law and conclude it expeditiously within a period of six months from the date of receipt of certified copy of this order, without prejudice to any of the observations made herein-above, as the suit was filed on 15-1-2010.

13. Records of the trial Court be sent back forthwith.

Sd/-
(Sanjay K. Agrawal)
Judge

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