

THE HON'BLE SRI JUSTICE SURESH KUMAR KAIT
CIVIL REVISION PETITION No.2602 of 2010

ORDER:

Vide the present Civil Revision Petition, petitioner seeks direction thereby setting aside impugned order in I.A.No. 550 of 2009 in OS.No. 2274 of 2007 dated 04/3/2010 on the file of IV-Senior Civil Judge, City Civil Court, Hyderabad.

2. Brief facts of the case are that:

Respondent No.1 is the plaintiff having filed suit for perpetual injunction against the petitioner and other Respondents 2 to 8 from interfering with possession and enjoyment of the property bearing survey No. 148 admeasuring Ac:2-16 guntas situated at Ibrahim Bagh village, Golconda Mandal, Hyderabad.

Respondent No.1 has alleged that he is owner and possessor of the property having purchased it from Yousuf and three others under registered sale deed dated 29/12/2005. He traces his alleged right over the property to one Rabia Begum, mother of the vendor of Respondent No.1 and that Rabia Begum has entered into an agreement of sale with T.Srinivasa Rao on 23/4/1970, received part payment of consideration on various alleged dates and possession was delivered to T. Srinivasa Rao. It is also alleged that T.Srinivasa Rao has been shown in the possessory column. Further, he goes to say that from 1981-82, the town survey was implemented. Hence pahanies were not issued. The Respondent No.1 further contends that during the life time of Rabia Begum, she gifted her rights in favour of Yousuf and Farooq under an alleged gift deed dated 06/11/1984. Rabia Begum died on 16/4/1996 leaving behind two sons and two daughters.

Respondent No.1 alleges that even though the consideration was received by Rabia Begum, she did not execute the sale deed

in favour of T.Srinivasa Rao. As such, it is alleged that the beneficiaries and sons of Rabia Begum, Yousuf and Syed Farooq along with T.Srinivasa Rao and his brother T.Yadav being the latter agreement holders jointly executed an alleged sale deed on 29/12/2005 in favour of Respondent No.1.

Defendants 1, 4, 5, 6 and 8 along with their associates tried to interfere in possession of the property. He applied for the certified copies of the document and further contends that the Respondent Nos. 2, 4, 5, 6 and 7 along with some other antisocial elements interfered in possession of the property. The Respondent No.1 came to know that Respondent No.2, the petitioner and Respondent No.3 colluded and created some fake documents. Based on it, the suit is filed for injunction claiming possession of the property.

Learned counsel appearing on behalf of the petitioner submits that the petitioner/defendant No.2 has filed written statement disputing the claim of Respondent No.1 and denied that neither Srinivasa Rao nor his brother were the alleged agreement holders and were not in possession of the property. That apart, it is contended that the alleged agreement of sale is fabricated and that T.Yadav Rao and Srinivasa Rao jointly instituted suit bearing O.S.No. 1243 of 2005 on the file of II-Junior Civil Judge, City Civil Court, Hyderabad for perpetual injunction against P.Govind Raj and others having realized that they have no right to withdraw the suit. The case was posted for evidence of Respondent No.1 and at that stage, an application was filed by Respondent No.1 seeking leave of the Court to withdraw the suit. Accordingly, the Court below permitted Respondent No.1 to withdraw the suit without going into the contentions raised by the Respondent No.1.

Learned counsel for the petitioner further submitted that the

Court below has failed to consider that withdrawal of suit is governed by the provisions of Order-XXIII, Rule-3 in the first instance where the Court has to consider (a) that the suit must fail by the reasons of some formal defect; or (b) there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or a part of the claim. In the present case, Respondent No.1 relied upon Order XXIII Rule 3 wherein it has to satisfy the Court that there are sufficient grounds to institute a fresh suit for the subject matter then only the Court can grant permission to Respondent No.1 for such withdrawal. But, while passing an order for withdrawal, the Court below has not considered the nature of claim and the defence taken by the petitioner, however, mechanically passed an order granting leave to Respondent No.1 for withdrawing the case.

Learned Counsel submitted that the Court below has committed an error of jurisdiction by granting leave to Respondent No.1 in respect of cause of action on an affidavit filed seeking relief that he is entitled to file a suit for cancellation of the alleged fake sale deed said to have been executed.

The question before this Court for consideration is whether such permission can be given for withdrawal of a suit for perpetual injunction filed by Respondent No.1 against the petitioner and other respondents.

Learned counsel for the petitioner submitted that Respondent No.1 was aware about the document executed by defendants 1 to 3 in favour of the other defendants, as Respondent No.1 has made a reference to the same in para 6 of the plaint. It is not the case of Respondent No.1 that he was not aware about the document. In such an event, Order II Rule 2 comes into operation as every suit shall include the whole of the claim which the plaintiff is entitled to

make in respect of the cause of action; but the plaintiff may relinquish any portion of the claim in order to bring the suit within the jurisdiction of the Court.

That apart, learned counsel for the petitioner further submitted, that Order II Rule 3 refers to omission to sue for one of several reliefs. On a reading of the averments in the plaint, it is evident that Respondent No.1 itself has stated that there are documents which have been obtained i.e., certified copies of the document. Once it has come to the notice of Respondent No.1, it cannot file a suit merely for perpetual injunction, and later cannot seek leave of the Court to withdraw the suit. Thus, the Court has no jurisdiction to grant permission. He submitted that the Court has not considered the implication of Order II Rule 3 in view of the contention raised by Respondent No.1.

While concluding the arguments for the petitioner, learned counsel submitted that the Court below has erroneously relied upon the judgment reported in a case of **JAJALA NARAYANA REDDY Vs K. MOHAN REDDY AND ANOTHER**^[1]. The said judgment has not been correctly interpreted by the Court. The Court while passing the order has observed “*What is permitted to be reserved under sub-rule (3) is the liberty to file a suit in respect of same subject matter and not on the same cause of action.*” Learned counsel submitted that the Court below has failed to distinguish between the ‘subject matter of the suit’ and a ‘claim arising out of it’ by giving permission, the Court ought not to have granted permission to withdraw the suit in the above circumstances.

Heard learned counsel for the parties at length and perused the material on record.

The petitioner/defendant No.2 filed written statement in the suit disputing the claim of respondent No.1 and denied that neither T. Srinivasa Rao nor his brother were the alleged agreement holders and were not in possession of the property. That apart, it is contended that the alleged agreement of sale is fabricated and that T.Yadav and Srinivasa Rao jointly instituted suit in O.S.No.1243 of 2005 on the file of II Junior Civil Judge, City Civil Court, Hyderabad for perpetual injunction against P. Govind Raj and others having realized that they have no right to withdraw the suit. The case was posted for evidence of respondent No.1 and at that stage, an application was filed by respondent No.1 seeking leave of the Court to withdraw the suit.

Withdrawal of a suit is covered by the provisions of Order XXIII Rule 3 in the first instance, where the Court has to consider (a) that the suit must fail by the reasons of some formal defect; or (b) there are sufficient grounds for allowing plaintiff to institute a fresh suit for the subject matter of a suit or a part of the claim. In the present case, respondent No.1 has relied upon Order XXIII Rule 3, wherein it has to satisfy the Court that there are sufficient grounds to institute a fresh suit for the subject matter, eventually, the Court can grant permission to the party to withdraw.

It is pertinent to mention here that while passing an order for withdrawal, the Court below has to consider the nature of the claim and the defence taken by the petitioner. But the order should not be passed mechanically while granting leave for withdrawal of the case.

The case of the petitioner is that respondent No.1/ plaintiff was aware about the document executed by defendants No.1 to 3 in favour of other defendants as respondent No.1/plaintiff has referred to the same in para-6 of the plaint. Thus, he was aware

about the document. In such eventuality, Order II Rule 2 comes into operation as every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of cause of action; but the plaintiff may relinquish any portion of the claim in order to bring the suit within jurisdiction of the Court.

It is pertinent to mention here that respondent No.1/plaintiff itself stated that there are documents which have been obtained i.e., certified copies of document. Once it has come to the notice of respondent No.1/plaintiff, it cannot file a suit merely for perpetual injunction and later cannot seek leave of the Court to withdraw the suit. In that case, I am of the opinion that the court has no jurisdiction to grant permission. The court ought to have considered the implication of Order II Rule 2.

In the case of **JAGDAMBAL AND ANOTHER V/s. MINOR SUNDARAMMAL** by next friend, **PONNUSAMI CHETTIAR AND ORS** ^[2], the Court observed that if there was no finding that there was a defect in the suit which prevented the plaintiff from going on. This is therefore a case in which this Court can interfere in revision.

In a case of **ABDUL GHAFUOR V/s. ABDUL RAHMAN** ^[3] decided by full Bench and held at para Nos. 6 and 10 as under:

6. I need scarcely emphasise, what appears on a plain reading of the second sub-rule that in cases falling under cl. (b) it is not incumbent on the Court to find that the pending suit is bound to fail. The defect, however, which would necessitate the institution of another action, would have to be the result of a bonafide mistake which cannot be cured or got over otherwise than by withdrawal. The rule constitutes an exception to the general doctrine which precludes the entertainment of successive litigation on the same cause of action between the same parties. By its incorporation in the Code, the Legislature it would seem, did not intend that even if the circumstances which give finality to the decision of a suit between the parties are present and the suit fails on evidence or the plaintiff does not conduct his

case with proper care and diligence, the Court should be able to get round that general doctrine by recourse to the provisions of sub-s. (2).

10. The decisions of the various High Courts in India are in consonance with the interpretation of sub-r. (2) which I am inclined to adopt. There have been two principal views about the scope of the expression 'other sufficient grounds'; used in cl. (b) – one favouring the application of ejusdem generis doctrine, that is to say, interpreting the words 'other sufficient grounds' as meaning grounds which are of the same genus as 'formal defects' and the other based on the principles enunciated by their Lordships of the Privy Council in the case of Chhajju Ram V/s. Neki, 49 I A. 144, holding that the expression 'other sufficient grounds' covers only such grounds as are analogous to 'formal defect'. In Md.Ejaz Rasul Khan V/s. Mubarak Husain, AIR (12) 1925 Oudh 291, Wazir Hasan J. purported to apply the ejusdem generis rule but said at the same time that the words 'other sufficient grounds' in cl. (b) should be given the same meaning as was given by their Lordships of the Judicial Committee in Chhajju Ram's case to the words 'other sufficient reasons' used by the Legislature in connection with applications for review of judgment in R. 1 sub-r. (1) cl. (c) of O. 47 of the Code. In other words that there must be sufficiency of a kind analogous to the grounds already specified. In support of his view, the learned Judge cited two earlier decisions of the Avadh Court in Rameshwar Bakhsh Singh v/s. Mirza Rasul Beg, 45 I.C. 603 and Rajindra Puri V/s. Beni Madho, AIR (12) 1925 Oudh 140. In Tikai Chowbay V/s. Firm Sheo Dayal and Ramji Das, 3 Luck, 403 Sir Louis Stuart C.J. and Raza J, relying on Watsib;s case (13 M.I.A. 160) also purported to adopt the ejusdem generic rule on the analogy of the decision of their Lordships in Chhajju Ram V/s. Neki. In Jagmohan Singh V/s. Ram Khilawan Dube, A.I.R. (16) 1929 ALL. 683, Mukerji and Boys JJ. Considered it to be beyond dispute that the expression 'other sufficient grounds' should be read ejusdem generis with 'formal defect'. Likewise in Jumma V/s. P. Ram Sahai, AIR (21) 1934 ALL. 137, Kendall J. held that the discretion of the Court in dealing with applications under Order-23 Rule 1 (2) was similarly restricted. The Bombay High Court has, as was held in Avadh now laid down that the grounds contemplated by cl. (b) must be analogous to those under cl. (a). Punjushet V/s. Motiram Budhu, 50 Bom. 192 and Ramrao Bhagwant rao V.s. Appanna Samage, I.L.R. (1940) Bom. 299 may be referred to in particular. In the first of these cases, Sir Norman Macleod who delivered the principal judgment of the Court and with which Coyajee J.agreed, refused to give an unlimited scope to cl. (b) and to permit a

plaintiff who was not likely to succeed in his suit owing to insufficiency of evidence or for some other reason of that character, to withdraw his suit with leave to reopen the dispute at a later date. The Full Bench decision in the second case says that the two clauses of sub.r (2) must be read together, that cl. (a) is illustrative of the “grounds’ mentioned in cl. (b) and that the words ‘other sufficient grounds’ must be analogous to a formal defect though they may not be fatal to the suit. In order to determine what grounds are analogous, Lokur J. who delivered the judgment of the Full Bench referred to the instances of defect of form cited in Watson’s case, namely, mis-joinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject matter of the suit, and said that they were illustrative of the cases which would fall under the clause. The expression ‘formal defect’ he observed ought to be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not.

I n RAMARAO BHAGWANTRAO INAMDAR AND
ANOTHER V/s. BABU APPANNA SAMAGE AND ORS^[4] the Full
Bench of Bombay High Court held that

the ground on which the parties who are made to withdraw the suit, is a defect of substance, as distinguished from a defect of form. In that case the petitioner prayed for an injunction on the basis of their being the owners of the site which they claimed to be an accretion to their land as an alluvion. They adduced all their evidence and failed to prove that the site was an alluvion. Their suit was dismissed. Then they wanted in appeal to be permitted to withdraw the suit in order to file another suit claiming title to the said site on the ground of their adverse possession for over twelve years. There was no defect of form in the suit, but a defect of substance, arising out of their inability to prove the title on which they had based their claim. They joined issues with the petitioners on that basis, and allowed the suit to be fully tried to the end. It was only when they found that the trial Court did not uphold their title as claimed by them that they sought to withdraw the suit in order to start the litigation afresh and ask for the same relief on a different basis. In Ishar Das V/s. Aya Ram, (1932) 19 AIR Lah 360 = 136 IC 1 = 13 Lah 537 = 38 PLR 275 if there are no sufficient ground to pass the order then the Court has no jurisdiction to pass such order.

In a similar issue in **SINGARAVEL PADAYACHI V/s.**

NAGAMMAL AND ORS ^[5], the Madras High Court observed that:

When the petitioner himself was an attesting witness and stated in the affidavit that he was not aware of the sale deeds previously. Now the Court held that the averment is totally false. When the plaintiff is aware about the existence of the sale deeds and has failed to raise the plea with regard to the validity of such sale deeds, it has to be considered that he has done so with open eyes. Moreover, the evidence was over and after assessing the evidence the petitioner has come forward with this application belatedly.

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The Hon'ble Supreme Court in case of **K.S. BHOOPATHY**

AND ORS. V/s. KOKILA AND ORS ^[6], held that

The approach of the High Court was that the plaintiff should have prayed for declaration of title which they had omitted to include in the plaint. It was for the plaintiffs to frame their suit in any form as advised. If they felt that there was a cause of action for declaration of their title to the suit property they could have made a prayer in that regard. If they felt that a declaration of their right to exclusive use of the pathway was necessary they should have framed the suit accordingly. On the other hand, the plaintiffs merely sought a decree of injunction permanently restraining the defendants from disturbing their right of use of the property. The Supreme Court held that the plaintiff realized the weakness in the claim of exclusive right of user over the property and in order to get over the findings against them by the first appellate court they took recourse to Order XXIII Rule 1 (3) CPC and filed the application for withdrawal of the suit with leave to file a fresh suit. The High Court does not appear to have considered the relevant aspects of the matter. Its approach appears to have been that since the interest of the defendants can be safeguarded by giving them permission for use of the pathway till adjudication of the controversy in the fresh suit to be filed, permission for withdrawal of the suit as prayed for can be granted. Such an approach is clearly erroneous. Accordingly opined that it is the duty of the court to feel satisfied that there exist proper grounds/reasons for granting permission for withdrawal of the suit with leave to file fresh suit by the plaintiffs and in such a matter the statutory mandate is not complied with by merely stating that grant of permission will not prejudice the defendants.

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In view of the above discussion and the settled law as discussed above, I hereby set aside the impugned order dated 04.03.2010 passed in I.A.No.550 of 2009 in O.S. No.2274 of 2007 on the file of IV Senior Civil Judge, City Civil Court, Hyderabad.

Accordingly, this Civil Revision Petition is allowed with costs of Rs.25,000/- to be paid by respondent No.1/plaintiff. Out of the cost amount, Rs.15,000/- shall be paid in favour of the petitioner and Rs.5,000/- each shall be paid in favour of Bar Association of Telangana State and Bar Association of Andhra Pradesh State.

Pending miscellaneous petitions, if any, shall stand closed.

JUSTICE SURESH KUMAR KAIT.

Date : -08-2016

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[\[1\]](#) 2004 (6) ALD 694

[\[2\]](#)) **THE MADRAS LAW JOURNAL REPORTS-1940 Page 398**

[\[3\]](#)) **AIR (38) 1951 ALLAHABAD-845 [C.N.211] [LUCKNOW BENCH]
FULL BENCH**

[\[4\]](#) AIR 1940 BOMBAY-121 FULL BENCH

[\[5\]](#)) **1996 A I H C 4653 [MADRAS HIGH COURT]**

[\[6\]](#)) **[2000] 5 SUPREME COURT CASES - 458**