

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.5299 of 2015

ORDER:

The 5th defendant in the suit-OS.no.127 of 2005 filed this revision petition under Section 115 of the Code of Civil Procedure, 1908 assailing the orders dated 18.08.2015 of the learned I Additional Chief Judge, City Civil Court, Secunderabad whereby the Court below, while taking on record the memo withdrawing the suit, filed in person by the plaintiff/1st respondent herein withdrawing the suit, had dismissed the aforesaid suit as withdrawn after recording the memo filed by the plaintiff.

2. I have heard the submissions of the learned counsel for the revision petitioner/5th defendant and the learned counsel appearing for the respondents 3 and 7 i.e., the defendants 2 and 7. The respondents 2, 4 to 6 and 8, who are the other defendants in the suit, are stated to be not necessary parties. Though the 1st respondent/plaintiff is not served with notice, she had appeared in person before this Court on 22.04.2016 and sought time to engage a counsel. On that day, she was identified by Sri T. Durga Prasada Rao, the learned counsel appearing for respondents 3 and 7 herein. Subsequently, she did neither appear before this Court nor enter appearance through an advocate as undertaken by her. Therefore, it is treated that she has no submissions to make in this revision.

2.1 The parties in this revision shall hereinafter be referred to as the plaintiff and the defendants as arraigned in the suit before the trial Court.

3. I have perused the material record.

4. The case of the 5th defendant, in brief, is this:

The plaintiff brought the suit against the defendants for partition of the plaint schedule properties *inter alia* stating that the plaint schedule properties

originally belonged to her father late Narsoji. The 1st defendant is the mother, the defendants 2 and 7 are the brothers and the defendants 3 to 6 are the sisters of the plaintiff. The 3rd defendant had remained *ex parte* in the suit. The defendants 1, 2 and 7 had entered appearance through one advocate and the defendants 4 to 6 and 8 had entered appearance through another advocate. While the suit is pending, the plaintiff personally filed a memo before the trial Court *inter alia* stating that the dispute is amicably settled outside the Court between her and her brothers and, therefore, she is voluntarily withdrawing the suit and hence, the suit may be dismissed. Taking the said memo on record, the trial Court had dismissed the suit as withdrawn. The said order is perverse and it resulted in miscarriage of justice. The trial Court did not consider the case in proper perspective and in accordance with the principles laid down in decided cases. The Court below ought not to have accepted the memo of withdrawal filed by the plaintiff. The Court below ought to have directed notice on that memo to all the defendants or at least to the contesting defendants including the 5th defendant. In a suit for partition, every party to the suit is a plaintiff. Hence, without hearing all the parties, a suit for partition cannot be permitted to be withdrawn. The memo does not disclose the reasons for withdrawal. The alleged compromise is not placed before the trial Court. The trial Court ought to have seen that a notice on the memo of the plaintiff is necessary to all the defendants as per settled legal position. The dismissal of the suit as withdrawn on the memo filed by the plaintiff without notice to all the parties vitiated the order that is impugned in this revision.

5. The case of the defendants 2 and 7, in brief, is this:

In the suit for partition filed by the plaintiff, the defendants 1, 2 and 7 had filed detailed and elaborate written statements. One of the contentions is that except 'C' schedule property the other plaintiff schedule properties were absolute properties of the father, who died testate on 23.08.1999 leaving a Will. In spite of the Will, pending the above suit, on the advice of elders and well wishers, the defendants 2 and 7 had compromised the matter by

executing a compromise deed on 19.09.2014, which was notarized. In the said compromise deed, except the mother, all the parties to the suit have signed. Though the mother had also agreed for the compromise, due to her advanced age and weakness she could not put her mark on the compromise deed. By the time of the compromise, the husband of the 5th defendant died. The husbands of the other sisters signed on the compromise deed as witnesses. As per the compromise, the defendants 2 and 7, who are the sons of the deceased, agreed to give 15 tolas of gold and 24 lakhs rupees in cash to the plaintiff. Further, the defendants 2 and 7 had agreed to give Rs.9.00 lakhs each to the other five sisters including the 5th defendant on or before 30.10.2014. As per the time stipulated in the deed of compromise, the defendants 2 and 7 offered to give and pay the amounts and also gold as agreed upon to the sisters, before the Court. However, the 5th defendant in the suit, that is, the revision petitioner herein insisted to give 15 tolas of gold and 24 lakhs rupees in cash outside the Court. Having insisted like that, she had kept quiet. While things stood thus, the plaintiff had filed a memo in the trial Court in the first week of August, 2015 stating that the matter was settled and that she wants to withdraw the suit and prayed to dismiss the suit. In the presence of the advocates of the parties, the trial Court passed the orders dismissing the suit as withdrawn without any prejudice to the right of the plaintiff's counsel to collect the fee. Though the 5th defendant insisted to give the cash as agreed upon under the compromise deed outside the court, she had kept quiet. However, after the trial Court dismissed the suit as withdrawn, being encouraged by her son-in-law by name Narendar, who is an advocate, she has filed the above CRP to harass the brothers and other sisters and her mother and thereby extract higher amount from the defendants 2 and 7. The 5th defendant had approached the Court with unclean hands. The CRP is not maintainable and is liable for dismissal.

5.1 Having so pleaded, the defendants 2 and 7, in fact, filed CRP.MP.no.2933 of 2016 to direct the plaintiff to produce the original compromise deed signed by the parties and attested by the witnesses. The defendants 2 and 7 had produced a copy of the compromise deed before this

Court.

6. The learned counsel for the 5th defendant and the defendants 2 and 7 advanced arguments in line with the respective cases of the said parties, which are stated supra.

7. The grievance of the 5th defendant, in short, is this: “The suit is admittedly filed by the plaintiff for partition. The compromise or adjustment, if any, entered into between the parties is not produced before the Court by the plaintiff. A request was not made to record the compromise, if any, by following the procedure under Order 23 Rule 3 of the Code and by filing an appropriate application before the trial Court. Simply, the plaintiff had personally filed a memo before the trial Court stating that the dispute is amicably settled between her and her brothers and, therefore, she had voluntarily agreed to withdraw the suit and, therefore, the suit may be dismissed as withdrawn. Even in that memo, the terms of the compromise are not stated. The compromise, if any, entered into and signed by all the parties or a copy thereof, if any, is not filed by the plaintiff along with the memo into Court. On that memo, neither the plaintiff offered notices nor did the Court order notices to the defendants in the suit. Ignoring the fact that in a suit for partition every party defendant is also a plaintiff and that as per law, an opportunity must be given to the defendants to transpose themselves as plaintiffs, if they so wished, the trial Court acted on the memo of the plaintiff and recorded the memo and dismissed the suit as withdrawn. In the said circumstances, the order of the Court below dismissing the suit as withdrawn after recording the memo of the plaintiff is unsustainable under facts and in law.”

8. The learned counsel for the defendants 2 and 7 while reiterating the contentions of the said defendants, which are already stated supra, in detail in paragraph no.5 supra, had contended as follows: “Since the matter was compromised and the terms of compromise were reduced into writing and the memorandum of compromise was signed by all the parties except the mother of the parties, who is also agreeable for the compromise, and as the same

was also attested by the husbands of the sisters of the defendants 2 and 7, except that of the 5th defendant, who is not alive, and as the plaintiff had also received 15 tolas of gold and rupees 24 lakhs as recited in the said compromise and as the compromise was acted upon, the 5th defendant is now not entitled to assail the order of dismissal of the suit on the withdrawal of the suit by the plaintiff. The 5th defendant is not entitled to question the compromise being a signatory to the compromise. The 5th defendant's request for transposition cannot be considered by this Court. When the plaintiff intended and wanted to withdraw the suit or abandon the suit, she cannot be compelled to prosecute the suit.

8.1 In support of his submissions, he had placed reliance on the following two decisions: (1) **Allu Appalaswamy and others v. Maturi Anjaneyulu** ^[1]; and (2) **M/s.Hulas Rai Baij Nath v. Firm K. B. Bass and Co.,** ^[2].

9. I have noted the submissions and I have given earnest consideration to the facts and the submissions. The suit is admittedly filed by the plaintiff for partition. The relationship of the parties is not in dispute. According to the plaintiff, the dispute is amicably settled with her brothers and, therefore, she had filed a memo voluntarily to withdraw the suit. Acting on that memo, the trial Court dismissed the suit as withdrawn. Admittedly, neither the plaintiff served notices on the memo nor did the Court issue notices on the said memo to the defendants or the counsel appearing for the defendants and, therefore, no opportunity of hearing was given to the defendants before the suit was dismissed as withdrawn at the request of the plaintiff. Though in the preface portion, which is not the part of the order, the presence of the counsel was noted, it is not even recorded in the order that the counsel for the parties present are heard. It is not also recorded that the counsel for the parties present had consented for recording the memo of the plaintiff and dismissing the suit as withdrawn. The legal proposition that in a suit for partition, every defendant is a plaintiff is not in dispute. Admittedly, the plaintiff did not file, into Court, with her memo a copy of the memorandum of compromise, if any,

entered into between the parties. She did not state the terms of the compromise in her memo filed for withdrawal of the suit. In the normal course of events, where a suit is withdrawn or abandoned by a plaintiff under Rule 1 of Order 23 and the defendant applies under Rule 10 of Order I, the Court shall consider such application having due regard to the question whether the defendant who made the application for transposition has a substantial question to be decided as against any of the other defendants. In this regard, it is necessary to refer to Order 23 Rule 1 and Rule 1A, which read as under:

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)

(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 authorize 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.

1A . When transposition of defendants as plaintiffs may be permitted— Where a suit is withdrawn or abandoned by a plaintiff

under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order I the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants.

In a suit for partition, where even every defendant is a plaintiff, where a suit is withdrawn or abandoned by the plaintiff, in the well considered view of this Court, the defendant/s must be given an opportunity of being heard before the suit is permitted to be withdrawn or abandoned by the plaintiff so that the defendants, who are interested, can avail the opportunity of filing the application for transposition as a plaintiff and for continuing and prosecuting the suit against the other defendants. Though the learned counsel appearing for the defendants 2 and 7 had vehemently contended that the plaintiff has withdrawn the suit only because of the compromise that was entered into between the parties, the compromise is not reported to the Court. Even a copy of the memorandum of compromise is not filed before the Court below. Unless a compromise is recorded in accordance with the procedure established by law and the suit is disposed of/decreed in terms of the compromise, the compromise entered into outside the Court will not acquire legal sanctity. Further, a compromise even if reported to the Court, unless it is proved to the satisfaction of the Court that the suit has been adjusted by any lawful agreement or terms in writing and signed by the parties, the Court will not record a compromise and pass a decree in accordance therewith. Even in a case where one of the parties to the compromise denies the adjustment or compromise after having signed the memorandum of compromise, the party, who is interested in recording the compromise and obtaining a decree in accordance therewith has to approach the Court and make a request to decide the fact as to whether a compromise was arrived at or not between the parties. Unless a compromise is recorded and the suit is disposed of in terms of the compromise or in a given case where a compromise disputed is produced before the Court and such dispute is decided by the Court and the compromise is accepted and recorded by the Court, the compromise entered into outside the Court by the parties to a suit will not acquire legal sanctity. In the case on hand, even according to the

defendants 2 and 7, the compromise insofar as the 5th defendant is not acted upon and the 5th defendant was not paid the sum of money which was said to have been stated in the compromise signed by the parties. It is the specific case of the defendants 2 and 7 that when the defendants 2 and 7 offered to give and pay the amounts and gold as agreed upon to the sisters before the Court, the 5th defendant insisted to give 15 tolas of gold and Rupees 24 lakhs in cash outside the Court and that having so insisted she had kept quiet. Therefore, in the well considered view of this Court, unless the compromise is reported to the Court and a request is made to the Court under Order 23 Rule 3 for recording compromise and passing a decree in terms therewith, the defendants 2 and 7 and the plaintiff cannot be heard to say that there is a compromise as the compromise, which is recognizable by the Court in a pending suit must always be made in open Court and the order also must be made under Order 23 Rule 1 and in conformity with the principles in the provisions of the law enshrined in the Code. Therefore, the order permitting the withdrawal of the suit on a memo filed by the plaintiff without notice to the defendants and without providing an opportunity of hearing to them which caused prejudice to the rights of the defendants is unsustainable and is liable to be set aside as the 5th defendant intends to transpose herself as a plaintiff and prosecute the suit.

10. Before parting with the case, it is to be noted that the learned counsel for the defendants 2 and 7 vehemently contended that in this revision petition, the 5th defendant had stated that the respondents 2, 4 to 6 and 8, who are the other defendants in the suit, are not necessary parties and that he had not taken notices to the said respondents in this revision petition and that the revision petition is, therefore, liable for dismissal for not taking notices to the said respondents/defendants. In the well considered view of this Court, this argument is not having acceptable merit. The plaintiff personally appeared before this Court and sought time to engage a counsel. Subsequently, she did neither appear before this Court nor enter appearance through an advocate as undertaken by her. The defendants 2 and 7, who are brothers, and who are stating that the matter is compromised with the plaintiff are

served with notices and they are being represented by the learned counsel. They are given an opportunity to contest the CRP. Moreover, in case the suit is restored, the trial Court will anyhow give notices to all the defendants including the defendants who had remained *ex parte*, if necessary. Further, before this Court, the 5th defendant is only disputing the withdrawal of the suit without notice. Notices are duly served on the plaintiff, the 1st respondent, and the defendants 2 and 7, who are the contesting parties. Therefore, the contention that the revision petition is liable for dismissal for not taking notices to respondents 2, 4 to 6 and 8 is rejected as having no acceptable merit.

11. Viewed thus, this Court finds that the order of dismissal of the suit as withdrawn on the memo of the plaintiff is liable to be set aside. Be it noted that in the decisions relied upon by the learned counsel for the plaintiff, it is laid down that if a party wants to withdraw a suit or abandon a suit, he/she cannot be compelled to proceed with the suit. In the case on hand, the 5th defendant is not compelling the plaintiff to prosecute the suit, but, the 5th defendant's request is only to set aside the order of dismissal as withdrawn and to permit her to apply to be transposed as a plaintiff under Order 23 and also Rule 10 of Order 1 of the Code.

12. In the result, the Civil Revision Petition is allowed and the order impugned dismissing the suit of the plaintiff as withdrawn is set aside for the limited purpose of enabling the 5th defendant to file an appropriate application before the trial Court for transposition as a plaintiff. On failure of the 5th defendant or any other defendant to file an application for transposition as plaintiff within one month from the date of the receipt of a copy of this order, the order dismissing the suit as withdrawn shall stand revived. It is needless to say that this Court did not express any opinion as to the genuineness or otherwise of the compromise being relied upon by the defendants 2 and 7; therefore, the defendants 2 and 7 are at liberty to make a request, if they so desire, to the trial Court for recording the compromise, if necessary, by conducting an enquiry in accordance with the procedure

established by law.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

16th June 2016

Vjl

[\[1\]](#) AIR 1974 AP 268 (V.61, C.52)

[\[2\]](#) AIR 1968 SC 111