

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

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Civil Revision Petition No.26 of 2015
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ORDER:

This civil revision petition under Article 227 of the Constitution of India by the unsuccessful 4th plaintiff is directed against the orders dated 11.07.2014 of the learned Senior Civil Judge, Chirala passed in IA.no.1473 of 2013 in OS.no.111 of 2006 filed by the 4th plaintiff under Order 23 Rule 1(3) and Section 151 of the Code of Civil Procedure, 1908 ('the Code', for brevity) requesting to permit him to withdraw from the suit and abandon his claim in the suit.

2. I have heard the submissions of the learned counsel for the revision petitioner/4th plaintiff ('the 4th plaintiff', for brevity). Though the respondents are served with the notices, none appeared. I have perused the material record.

3. The facts, which are to be stated as a prelude to this order, in brief, are as follows:

The plaintiffs 1 to 4 together brought the suit against the defendants for specific performance of a contract of sale dated 05.07.2001 executed by the 1st defendant in favour of plaintiffs 1 and 2 and others, that is, the defendants 2 and 3 in the suit. The suit is being resisted by the 1st defendant. During the pendency of the suit, the 4th plaintiff filed the aforementioned application to permit him to withdraw from the suit and abandon his claim in the suit. That petition was resisted by the plaintiffs 1 and 3 by filing counter. On merits, the trial Court had dismissed the petition of the 4th plaintiff. Therefore, the 4th plaintiff is before this Court.

4. The learned counsel for the 4th plaintiff would contend as follows: -
'The order of the Court below is vitiated by irregularities and jurisdictional

errors. The Court below ought to have seen that if the petition of the 4th plaintiff is allowed, no prejudice would be caused to the other plaintiffs as there is an independent claim for each plaintiff in respect of the suit agreement of sale. Further, since the 4th plaintiff is unwilling and is incapable of bearing the suit costs, he had filed the petition for withdrawing from the suit and abandoning his claim in the suit. He is prepared to withdraw from the suit and abandon his suit claim unconditionally. The Court below ought to have seen that the suit agreement deals with a number of mulgies. Therefore, no prejudice would be caused to the other plaintiffs, if he is permitted to do so. The Court below erred in holding that the consent of other plaintiffs is necessary for withdrawal of the claim by the 4th plaintiff though such consent is not mandatory and the Court is having discretionary power to permit the 4th plaintiff to withdraw from the suit and abandon his suit claim even without the consent of the other plaintiffs. In-fact, the Court below ought to have seen that it had permitted the plaintiffs 5 to 8, who are the legal representatives of the 2nd plaintiff to abandon their claim for specific performance on a memo filed by them on 21.07.2008 and had dismissed the suit so far as the claims of the plaintiffs 5 to 8. When such permission was granted to the said plaintiffs even on a memo, the Court below is not justified in dismissing the petition of the 4th plaintiff, which is filed by following the procedure established by law. The court below failed to properly appreciate the legal position.

5. Before proceeding further, it is profitable to refer to Order 23 Rule 1 of the Code, which reads 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.

6. Now, to continue with the narration of the case of the 4th plaintiff, it is necessary to refer to the contents of the affidavit of the 4th plaintiff filed in support of the request made to the trial Court, which are as follows: - 'The suit is filed along with the other plaintiffs for specific performance. It is pending. The 4th plaintiff had now decided to withdraw from the suit and abandon his claim in the suit unconditionally. The 4th plaintiff is withdrawing from the suit and is abandoning the suit only insofar as his interest is concerned. Hence, the same does not cause any prejudice to the remaining plaintiffs in any manner. In fact, the plaintiffs 5 to 8 had already withdrawn from the suit and had abandoned their claim and the Court had permitted them to do so. Since the 4th plaintiff is willing not to pursue the matter, he is advised to file the petition.' A plain reading of the contents of the affidavit of the 4th plaintiff would show that the 4th plaintiff is not withdrawing the suit and abandoning the claim for the reason of some formal defect and on the ground that if the

suit in the present form is continued, the suit may fail. The only ground urged in the affidavit is that he had decided to withdraw the suit and abandon his claim insofar as his interest in the suit claim is concerned. Simply because the trial Court had erroneously dismissed the suit claim insofar as the plaintiffs 5 to 8, who are the legal representatives of the deceased 2nd plaintiff on filing of a memo by them that they are abandoning their claim for specific performance without following the procedure established by law and without giving an opportunity to the remaining plaintiffs, that does not give a right to the present 4th plaintiff to make a request for withdrawal of the suit insofar as his claim is concerned and abandon his claim without the consent of the other plaintiffs. The 4th plaintiff is one of the several plaintiffs in the suit. Sub rule 5 of Rule 1 mandates that nothing in the Rule shall be deemed to authorize the Court to permit one of the 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. The plaintiffs 1 and 3 having filed counters are resisting the request of the 4th plaintiff for abandoning the suit insofar as his claim is concerned or to withdraw. Therefore, it is manifest that the plaintiffs 1 and 3 are not consenting for the request of the 4th plaintiff.

7. The learned counsel for the 4th plaintiff placed reliance on a decision in **Ramanivas Gupta and others v. Maliram** [2002(5) ALD 362] wherein the facts are as follows: 'The plaintiffs 1 and 2 have filed a memo stating that they have no interest in the subject matter of the suit. The 3rd plaintiff did not consent for withdrawal of the suit.' Having regard to the said facts of that case, this Court held that the entire suit claim cannot be dismissed because as per sub-rule (5) of Rule 1 of Order 23 of the Code a suit can be withdrawn only when all the plaintiffs have given consent for such withdrawal and that, therefore, the claim of the 3rd plaintiff has to be determined without being influenced by the fact that the 1st and 2nd plaintiffs have withdrawn their claim in respect of two, out of the three mulgies, covered by exhibit A3 in that suit. A reading of the decision would show that there is no proposition laid down in

the cited decision to support the case of the 4th plaintiff that he can be permitted to withdraw or abandon the suit insofar as his claim is concerned even without the consent of the other plaintiffs. Further in the decision in **Kanakala Venkata Rao v. Konda Krishnam Raju and others [1996(1) ALT 838]** also relied upon, the facts disclose that the plaintiff sought specific performance in respect of his share only as the other agreement holders/sharers did not co-operate with him; and hence, the question that fell for consideration was whether the plaintiff has to pay Court fee on the value of the entire extent of land covered by the agreement or only on the value of the extent of land in respect of which he is seeking specific performance. This Court held that the plaintiff has to pay the Court fee on the value of the extent of land in respect of which he is seeking specific performance of the contract. This decision is also not helpful to the 4th plaintiff as the facts of the instant case and the question involved are totally different.

8. In view of the clear mandate of law and the fact that the other plaintiffs 1 and 3 are not consenting for the request of the 4th plaintiff, this Court finds that the request of the 4th plaintiff cannot be considered and that the order impugned need not be interfered with, being just and in accordance with facts and law.

9. In the result, the Civil Revision Petition is dismissed. 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