

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.4475 of 2011

ORDER:

This revision under Article 227 of the Constitution of India by the unsuccessful petitioner/plaintiff is directed against the orders dated 25.08.2011 of the learned Junior Civil Judge, Anaparthi passed in IA.no.27 of 2011 in OS.no.645 of 2009 filed by the plaintiff under Order 23 Rules 2 and 3 and Section 151 of the Code of Civil Procedure, 1908 ('the Code', for short) requesting to permit the plaintiff to withdraw the suit at present with a liberty to file separate proceedings on the same cause of action against the defendants.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff ('the plaintiff', for brevity) and the learned counsel for the respondents 5 and 6/defendants 5 and 6 ('the defendants 5 and 6', for brevity). I have perused the material record.

3. The case of the plaintiff, in brief, is this:

The suit-OS.no.213 of 2002 is filed to declare the title of the plaintiff over the 'ABCD', 'EFG' and 'HIJK' portions shown in the plaint plan and for consequential possession of the same and for a perpetual injunction, future profits and costs etcetera. The former counsel of the plaintiff drafted the plaint. After the defendants had entered appearance and filed their written statement, the trial in the suit had commenced. While so, the said suit was transferred from the file of the Court of the learned Principal Junior Civil Judge, Ramachandrapuram to the present Court, that is, the Court of the learned Junior Civil Judge, Anaparthi and was re-numbered as OS.no.645 of 2009. The former counsel of the plaintiff had died. Another advocate Sri M. Jaya Prakash is from

Kakinada. He expressed his inability to come over to Anaparthi and conduct the case. Hence, the plaintiff had engaged the present advocate Sri V. Gopal along with Sri G.D. Prasanna Kumar, advocate for prosecuting the said suit. The said advocates while going through the plaint and the written statement had informed the plaintiff that there is no synchronization between the plaint plan and the schedule and that even though in the plaint plan three different plots are shown, only a single schedule is attached to the plaint with single item and that in fact three comprehensive suits have to be filed against the illegal occupants of the respective portions, that is, 'ABCD', 'EFG' and 'HIJK' for declaration of title and recovery of possession and other reliefs etcetera. Having so informed, the present counsel advised the plaintiff to request the Court to withdraw the present suit reserving liberty to file fresh suit if necessary at an appropriate time. There is neither negligence nor wilful laches on the part of the plaintiff. The plaintiff *bona fide* believed the former counsel and acted as per his advice. However, on engaging the present counsel, it was apprised of the correct position. Therefore, the present petition is filed to permit the plaintiff to withdraw the present suit with liberty to take separate proceedings on the same cause of action against the defendants.

4. The case of defendants 5 and 6 in their counter is as follows:

The suit is filed in the year 2002 against the defendants 1 to 4 alleging that they have encroached into the plaint schedule property. The deceased 3rd defendant had submitted a written statement in the year 2002 stating that he is no way concerned with the alleged encroachment of the suit site on the Southern side. He had also stated that the property belonged to his sons, that is, the defendants 5 and 6. Though such a written statement was filed by the 3rd defendant, no appropriate action was taken by the plaintiff within a reasonable time.

On the death of the 3rd defendant, his sons are impleaded as defendants 5 and 6. The action of the plaintiff caused lot of mental agony and physical strain to the 3rd defendant during his life time, that is, from the date of institution of the suit till the date of his death. He had spent lot of money on the fee paid to the advocates and other expenses. He had spent lot of his time un-necessarily in defending the suit with which he is unconcerned. The 5th defendant is a resident of Rajahmundry. He is a business man. The 6th defendant is a resident of Hyderabad. He is practicing advocate before the High Court. After the impleadment of the defendants 5 and 6, they had spent lot of money on their travel to the trial Court from their respective places of residence. They were also subjected to mental agony and physical strain. When the matter is coming for the evidence of defendants 5 and 6 and when the trial is almost at the stage of conclusion, this application is filed for withdrawal of the suit reserving liberty to file fresh suits on the same cause of action. The application filed at a belated stage with a *mala fide* intention without assigning valid reasons is unsustainable. There are several errors committed while instituting the suit. Therefore, knowing fully well that the suit is likely to be dismissed, the plaintiff wisely filed the present petition under ill advice. However, the defendants 5 and 6 have no objection for the plaintiff withdrawing the suit but it cannot be given liberty to file fresh suits or proceedings on the same cause of action.

5. At the time of enquiry before the trial Court, no oral and documentary evidence was adduced on either side. On merits and by the order impugned, the trial Court had dismissed the petition of the plaintiff. Therefore, the aggrieved plaintiff is before this Court.

6. The learned counsel for the plaintiff while reiterating the pleaded case of the plaintiff would further submit as follows: - 'The suit filed was defective on the face of it. Hence, the defect is to be remedied. The

Court below ought to have seen that no prejudice would be caused to the defendants if the plaintiff is permitted to withdraw the suit and file fresh suits on the same set of facts but for distinct and different reliefs. The Court below ought to have permitted the plaintiff to withdraw the suit by granting the liberty to file fresh suits as prayed for in view of the ingredients of Order 23 Rule 1 of the Code. The Court below by erroneous order dismissed the petition without considering the facts and the legal position correctly.'

7. On the other hand, the learned counsel for the defendants 5 and 6 while supporting the orders of the Court below would contend that the petition is filed at a very belated stage when the suit is at the stage of adduction of evidence on the side of the defendants 5 and 6 and that the defendants inspite of the fact that they had incurred lot of expenditure and suffered mental agony and physical strain had reported no objection for the plaintiff withdrawing the suit but objected for the Court giving liberty to file fresh suits and that the Court below having appreciated the facts and the plight of the defendants 5 and 6 correctly had rightly rejected the request of the plaintiff and directed it to prosecute the suit, which is at the fag end of the trial.

8. I have bestowed my attention to the facts and the submissions. Undeniably, the plaintiff filed the suit to declare title over 'ABCD', 'EFG' and 'HIJK' portions shown in the plaint plan and for consequential relief of recovery of possession of the said portions of property and for perpetual injunction, future profits, costs etcetera and is prosecuting the suit against the defendants. The defendants 5 and 6 are resisting the suit. Be that as it may. The case of the plaintiff in support of its present request is this: 'The former counsel of the plaintiff, who drafted the plaint, died. Another advocate Sri M. Jaya Prakash is from Kakinada. He had expressed his inability to come over to Anaparthi and conduct the case. Hence, the plaintiff had engaged the present advocate Sri V. Gopal along

with Sri G.D. Prasanna Kumar, advocate for prosecuting the said suit. The said advocates while going through the plaint and the written statement had informed the plaintiff that there is no synchronization between the plaint plan and the schedule and that even though in the plaint plan three different plots are shown, only a single schedule is attached to the plaint with single item and that in fact three comprehensive suits have to be filed against the illegal occupants of the respective portions, that is, 'ABCD', 'EFG' and 'HIJK' for declaration of title and recovery of possession and other reliefs etcetera. Having so informed, the present counsel advised the plaintiff to request the Court to withdraw the present suit reserving liberty to file fresh suits if necessary at an appropriate time. Since the plaintiff had *bona fide* believed the former counsel and acted as per his advice, there is neither negligence nor wilful laches on the part of the plaintiff. The plaintiff had filed the present petition on the present counsel apprising it with the correct position.' From a reading of the case of the plaintiff, it appears that the plaintiff intends to withdraw the suit as the suit suffers from a formal defect and that if the suit is continued in the present form, it is liable for dismissal on account of the formal defect. Though the case of the contesting defendants 5 and 6 is that their father, the deceased 3rd defendant, had suffered mental agony and physical strain and that he had spent lot of money towards advocate fee and expenses in defending the suit and that they also had suffered mental agony and physical strain and also incurred expenses in defending the suit, they have no objection for the plaintiff withdrawing the suit; but, their only objection is in regard to giving liberty to the plaintiff to file fresh suits on the same cause of action.

9. In view of the contentions and rival contentions, it is apt to refer to Order 23 Rule 1 which reads as follows:

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.

A plain reading of the provision shows that where the Court is satisfied 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, 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. In the case on hand, as already noted, the plaintiff submits that it ought to have filed three comprehensive suits for comprehensive reliefs against the respective occupants of the respective portions of the plaint plan

properties, that is, 'ABCD', 'EFG' and 'HIJK', and that in the present suit by mistake of the former counsel in drafting the pleadings there is no synchronization between the plaint plan properties and the schedule and that therefore, the suit is likely to fail by reason of that formal defect and that, therefore, the plaintiff is advised to file three fresh suits in respect of the subject matter of the suit.

10. Having regard to the facts and the submissions, this Court is satisfied that the provision of law squarely applies to the facts of the case; therefore, this Court finds that the plaintiff is entitled to the grant of the relief claimed. Nonetheless, this Court is of the well considered view that the plaintiff can be granted the permission sought for, however, on certain terms to compensate the hardship that was caused to the defendants 5 and 6 in defending the instant suit till the present advanced stage.

11. Viewed thus, this Court finds that the order impugned calls for interference and that the order is liable to be set aside.

12. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.27 of 2011 in OS.no.645 of 2009 is allowed and the plaintiff is granted permission to withdraw from the present suit with liberty to institute fresh suit/s in respect of the subject matter/s, however, on deposit of costs of Rs.5,000/- (Rupees Five Thousands Only) to the credit of the suit before the trial Court within one month from the date of the receipt of a copy of this order. On such deposit, if any, made by the plaintiff, the defendants 5 and 6 are permitted to withdraw the same by filing appropriate application/s in accordance with the procedure established by law. However, on failure to make the deposit as directed supra, the order of the trial Court, which is impugned in this revision, shall stand revived.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

24th June 2016
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