

HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 2064 of 2017

ORDER:

1) Assailing the order dated 30.01.2017, passed in I.A.No.554 of 2016 in O.S.No.172 of 2006 on the file of the Additional Senior Civil Judge, Tirupati, wherein an application filed Under Order XXIII Rule 1 and Section 151 of C.P.C. seeking permission of the Court to withdraw the suit was rejected, the present revision is filed under Article 227 of the Constitution of India.

2) The facts in issue are as under:

The petitioner/plaintiff filed O.S.No.172 of 2006 seeking division of the plaint schedule property into four equal shares with metes and bounds by taking into consideration the good and bad qualities and to allot one such share to the plaintiff. The plaintiff is the only daughter of defendant No.1. Defendant Nos.1 and 2 are the brothers and the suit schedule property originally belonged to one R.Jayarami Reddy, who is the father of defendant Nos.1 and 2. The marriage of the plaintiff was performed in the year 1995 and at the time of marriage, no dowry or property was given to the plaintiff since the plaintiff is the only daughter of defendant No.1 and she would be entitled to the entire share. It is stated that defendant No.1, being kartha of joint family property mismanaged the family

properties in order to deprive the legitimate share of the plaintiff and is making hectic efforts to alienate the entire ancestral property and joint family properties. It is also stated that defendant Nos.1 and 2 entered into an agreement of sale with defendant No.3 without consent and knowledge of the plaintiff, hence, filed the suit for partition.

3) Written Statement came to be filed by defendant No.1 opposing the same. It is stated in the written statement that defendant No.2 had acquired most of the properties with his own earnings and hardship and that they never purchased any property from and the income of their father. Out of affection and on the advice of elders and relatives of both the parties, defendant No.2 allotted some properties to defendant No.1. After the death of their father, an amicable partition took place in between defendant Nos.1 and 2 and their mother, pursuant to which a registered partition deed was also executed and they are enjoying their respective shares exclusively with absolute rights. It is said that the plaintiff filed the present suit at the instigation of the husband of the plaintiff, with a view to extract money from them.

4) Pending the said suit the petitioner/plaintiff filed an application to withdraw the suit on the ground that she has not included all the properties of the family and also other co-parceners as parties.

5) A counter came to be filed opposing the same. It is however stated in the counter that PWs.1 and 2 clearly admitted that the plaint schedule property belonged to the wife of defendant No.2 and also with regard to the partition deed. Hence, it is pleaded that the admissions cannot now be allowed to be withdrawn. It is also stated in the counter that the plaintiff intentionally not added the wife of defendant No.2, who is the owner of the plaint schedule property, as party to the suit. It is further stated that the evidence of the plaintiffs was completed long back and when the suit is posted for cross examination of the defendants, the question of permitting the petitioner to withdraw the suit permitting him to file fresh suit cannot be allowed.

6) After considering the rival submissions made, the trial Court rejected the said application. Challenging the same the present revision came to be filed.

7) Order XXIII Rule 1(3) of Code of Civil Procedure deals with grant of permission to withdraw the suit or such part of the claim with liberty to institute a fresh suit in respect of the same cause of action.

8) The satisfaction of the court, that the suit shall fail by reason of some formal defect, is mandatory. Hence, it is essential for the plaintiff, while seeking leave of the court under Order XXIII Rule

1(3) of the CPC to establish normal defects in the suits which are likely to lead dismissal of the suit. Thereupon, if the court is satisfied that the suit shall fail by reason of such defect, then only the plaintiff can be permitted to withdraw the suit with a liberty to file a subsequent suit.

9) In *Pillakathuku Subbarathnam and another v. Executive Officer, Polathala Malleswaraswamy Temple, Kadapa and others*¹ the expression "sufficient grounds" came up for consideration. After considering all the authorities on the subject, this Court held as under:

"The expression "sufficient grounds" may have to be considered liberally depending upon the facts and circumstances of a given case. In view of the peculiar facts and circumstances when specific ground had been taken relating to the defective pleading and defective reliefs prayed for, this Court is of the considered opinion that it would be just and proper to permit the revision petitioners to withdraw the present suit with a liberty to institute a fresh suit, if so advised in relation to the subject matter of the suit or to the part of the claim of the said suit."

10) In *V.Rajendran (1 supra)* the Apex Court held as under:

"In terms of Order 23 Rule 1 (3) (b) where the Court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the words "sufficient grounds", there are two views: one view is that these grounds in clause (b) must be "ejusdem generis" with those in clause (a), that is, it must be of the same nature as the ground in clause (a), that is, formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause (b)

¹ (2005) 5 ALD 75

should be read independent of the words a "formal defect" and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in case where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with 'formal defect' envisaged under clause (a) of Rule 1 sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b), that is "sufficient grounds".

11) There is no dispute with regard to the proposition of law laid down in the judgments of this Court and also by the Apex Court in the judgments referred to above, but it is to be noted here that the petitioner herein made an application vide I.A.No.26 of 2015 to implead Smt.R.Vimalamma as D-5, who is the wife of second defendant and also filed another I.A. i.e., I.A.No.27 of 2015 seeking amendment of survey numbers of the plaint schedule properties which are said to be in the name of R.Vimalamma. Both the I.As., came to be dismissed against which C.R.Ps., were filed. That being the position, the question of permitting the petitioner to withdraw the suit with a liberty to file a fresh suit would not arise. When the petitioner has availed the remedy of including Smt. R.Vimalamma as a party and also took steps for getting the property included and when the said civil revisions are pending consideration before this Court, the question of permitting the petitioner to withdraw the suit may not be permissible. It appears to be a case where the petitioner being unsuccessful in getting interim orders in the said C.R.Ps., thought of withdrawing the suit. Since the dispute as to whether the said R.Vimalamma has to be included as a party and also as to whether

the properties can be included in the said suit, are pending adjudication before this Court and when the trial court has already held that their inclusion is impermissible, which is not stayed by this Court, I see no ground to grant permission for withdrawal of the suit.

12) Accordingly, the Civil Revision Petition is dismissed. No costs.

Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

Dt: 07.09.2017
GM

