

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 346 of 2017

ORDER:

1) Assailing the order dated 30.11.2016, passed in I.A.No.447 of 2016 in O.S.No.297 of 2015 on the file of the Special Sessions Judge-cum-IV Additional District Judge, Tirupati, wherein an application filed Under Order XXIII Rules 1 (3) (b) and Section 151 of the code of Civil Procedure seeking permission of the Court to withdraw the suit, was rejected, the present revision came to be filed under Article 227 of the Constitution of India.

2) The petitioner herein is the plaintiff and the respondents herein are the defendants before the trial Court. For the sake of convenience, the parties hereinafter referred to as arrayed in the suit.

3) The facts in issue are as under:

The petitioner/plaintiff filed O.S.No.297 of 2015 seeking permanent injunction restraining the defendants from registering the suit schedule property by sale, gift, mortgage or in any other manner detrimental to the agreement of sale in the name of the plaintiff. It is stated that though the agreement of sale executed by Sapthagiri Co-operative House Building Society Limited, represented by its President and Secretary in favour of the plaintiff but the suit was filed against the individuals, who are President and Secretary of the Society along with legal heirs of the vendors of the society. It is also stated that the suit ought to

have been filed seeking relief for specific performance of agreement of sale, but was filed only for permanent injunction. In view of the above defects, the plaintiff filed a petition seeking withdrawal of the suit with a liberty to file a fresh suit on the basis of agreement of sale.

4) A counter came to be filed by the 2nd respondent contending that the respondents 1 and 2 never purchased the plaint schedule properties at any time and that the respondents are not the owners of the property.

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

6) Learned counsel for the petitioner mainly contended that though the plaintiff purchased the suit schedule property from Sapthagiri Co-operative House Building Society, represented by its President and Secretary, but he filed the suit against the President and Secretary of the society along with legal heirs of the vendor of the society in their individual capacity. Hence, the plaintiff seeks for withdrawal of the suit with a liberty to file a fresh suit for specific performance of contract basing on the agreement of sale.

7) On the other hand, learned counsel for the respondent submits that if the plaintiff wants to withdraw the suit, he may be permitted to withdraw the suit but liberty cannot be granted to file a fresh suit.

8) Before proceeding further, it would be useful to refer to Order XXIII Rule 1 (3)(b) of C.P.C., which reads as under:-

“(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:

(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.”

9) Learned counsel for the petitioner mainly seek permission to withdraw the present suit with a liberty to file a fresh suit for specific performance of agreement of sale dated 15.12.2014. Originally, the petitioner filed a suit seeking the relief of permanent injunction. Later, he approached the Court by filing a petition under Order XXIII Rule 1(3)(B) of CPC, seeking to withdraw the suit with a liberty to file a suit for specific performance of an agreement on the same cause of action. It is to be noted that the agreement of sale, under which the cause of action arose, is dated 15.12.2014. According to Article 54 of the Limitation Act, 1963, every suit for specific performance of agreement of sale shall be filed within three years from the date of its execution.

10) In *B. Rizwang Baig v. Municipal Corporation of Hyderabad and another*¹ a learned single Judge of this Court while dealing with Order XXIII Rule 1 of C.P.C. observed that permission to withdraw the suit with liberty to file fresh suit can be granted even if the defect is formal or fatal. In other words it is said that if the formal defect is going to fail the suit, then it is just the same if the defect is styled as 'fatal' because that would equally cause fatal to the suit. Hence the end result is just the same. If that be so, whenever permission is sought for withdrawal of a suit if the Court is satisfied that a suit must fail because of certain formal defect, then permission may be granted.

11) In *M. Subba Rao v. B. Vasanth and others*² a division bench of this Court observed as under:

“It is the absolute right of the suitor as the suitor can bring his lis of his own choice and wishes. Neither the Court nor anyone else can compel any person to come to the Court. With the parity of reasoning after having brought action, the litigant decides not to continue with his lis, such decision is final and no one can sit on that claim. We feel that asking for leave is only matter of courtesy and respect and grant of leave is matter of course not of discretion and it is manifest in Clause (b) sub-Rule (3) of Rule 1 of the Code, wherein words “may grant” are employed. If the suitor wants to bring fresh action on the self-same cause of action while asking for withdrawal of lis, then the power to allow such prayer is left with discretion of the Court and not with choice of the suitor. In other words, the suitor cannot claim, as a

¹ ALT 1989 (2) 476

² (2014) 4 ALT 298 (D.B.)

matter of right, the liberty to bring a fresh action on the self-same cause of action. Clause (b) sub-Rule (4) of Rule 1 of the Code wherein like Clause (b) sub-Rule (3) of Rule 1 of the Code words “may grant permission” are not mentioned.”

12) In *Pillakathuku Subbarathnam and another v. Executive Officer, Polathala Malleswaraswamy Temple, Kadapa and others*³ 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.”

13) In the instant case, the contents of the affidavit filed in support of the petition would show that the petitioner purchased the property from a society represented by its President and Secretary. It is further stated that the suit is filed seeking injunction against the President and Secretary individually. The trial Court proceeded on footing that the petitioner wants to convert the said suit from permanent injunction to specific performance of contract which is not permitted by the provisions

³ (2005) 5 ALD 75

of the Limitation Act. But as seen from the record, originally the suit was filed for injunction against the individual persons. Now it is said that the appropriate party would be the society represented by its President and Secretary and as such he wants to withdraw the suit, with a liberty to file a suit for specific performance of contract against the society represented by its President and Secretary as the society failed to fulfil its part of contract. It is also to be noted that the agreement which is sought to be implement is dated 15.12.2014. Still, the petitioner has another six months to initiate a suit for specific performance of the said agreement. Viewed from any angle this Court is of the view that no prejudice would be caused to the respondent, if the permission is granted.

14) In view of the judgments referred to above and for the aforesaid reasons, the Civil Revision Petition is allowed, permitting the petitioner to withdraw O.S.No.297 of 2015 on the file of the Special Sessions Judge-cum-IV Additional District Judge, Tirupati, with a liberty to file a fresh suit. There shall be no order as to costs.

15) Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

26.04.2017
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