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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 16.02.2017

+ CM(M) 243/2015

MEENA

..... Petitioner

Through Mr.Manish Bansal, Mr.Robin Bansal
and Ms.Aarti Tyagi, Advocates.

versus

RAJ KUMAR GOEL & ANR

..... Respondents

Through Mr.B.K.Sood and Mr.Sandeep
Thukral, Advocates.

CORAM:

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.(ORAL)

1. By the present petition filed under Article 227 of the Constitution of India, the petitioner seeks to impugn the order dated 30.01.2015 by which an application filed by the petitioner/plaintiff under Order XXIII Rule 1 CPC was partly allowed and the liberty was granted to the petitioner to file a fresh suit with respect to the relief of permanent injunction. The court held that there can be no occasion to consider the question of granting liberty with respect to any other reliefs as no such other reliefs have been sought in the present suit.

2. The petitioner/plaintiff who is the sister of the respondents filed the present suit against her two brothers in 2010. The title of the plaint stated is as "Suit for Cancellation of Title Documents of the property no. 4660-63, Gali no. 49, at Raiger Pura, Karol Bagh, New Delhi- 5 and Permanent

Injunction”. It was averred that the property was owned by the father of the parties, namely, Sh.Kishan Saroop who died on 27.08.1997. It was averred that the petitioner came to know that the respondents have forged certain documents and transferred the property in their name. It was claimed that the petitioner is the owner of 1/10th share of the property.

3. The respondents filed their written statement pointing out that the petitioner is aware of the fact that the father had left behind a registered Will dated 21.04.1997 and that she had furnished an affidavit of no objection to the DDA for mutation of the suit property in favour of five brothers including the respondents.

4. When the suit was at the stage of final arguments, the petitioner has moved the present application under Order XXIII Rule 1 CPC for permission to withdraw the suit with liberty to file a fresh suit. The only ground given for moving the application was that the petitioner ought to have filed a suit for partition and possession along with the relief of cancellation of documents and permanent injunction. This was not done by mistake.

5. The trial court by the impugned order as noted above, apart from imposing costs on the petitioner granted liberty only to file a fresh suit for injunction noting that the present suit was filed for permanent injunction and the said relief is a continuous cause of action. Regarding liberty to file a suit with respect to other reliefs, as no such reliefs have been pressed in the present suit, such liberty could not be granted.

6. I have heard the learned counsel for the parties.

7. Learned counsel for the respondents has vehemently argued that the petitioner despite having several adjournments could not lead any evidence

and her right to lead evidence was closed. Subsequently, an application filed to recall the said order closing her evidence was also dismissed. He submits that in order to save the suit from the obvious fate which it would have met, the petitioner mischievously filed the present application. Hence, it is urged that no relief can be granted to the petitioner.

8. Order 23 Rule 1 (3) & (4) CPC reads as follows:-

“1. Withdrawal of suit or abandonment of part of claim.-

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(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), or

(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.”

9. Hence, it is only where if the court is satisfied that a suit is likely to fail on any formal defect or that there are sufficient grounds for allowing the

petitioner to institute a fresh suit for the subject matter of a suit or part of a claim, the court may grant permission to the plaintiff to withdraw such suit with liberty to institute a fresh suit in respect of the subject matter of such suit.

10. A perusal of the impugned order in the present case would show that none of the reasons which are stated above under Order 23 Rule 1 CPC have been recorded by the trial court while partly allowing the application seeking leave to withdraw the suit. The trial court failed to record existence of any formal defects in the suit or to record existence of any sufficient grounds which would permit the petitioner to file a fresh suit after withdrawal of the present suit.

11. Another aspect which has to be noted is that in the application that was filed by the petitioner, the relief sought was for permission to withdraw the suit with liberty to file a fresh suit. The trial court was bound either to allow the application or dismiss the application. It has however granted a conditional relief, namely, liberty is granted to withdraw the suit with liberty to file a fresh suit regarding the relief of injunction but not regarding other reliefs as such reliefs were not sought by the petitioner and could not have been given on an application. As noted above, the trial court if not convinced about the merits of the reliefs ought to have dismissed the application instead of allowing it partly. In fact, the relief granted serves no purpose. The petitioner sought leave to withdraw the suit with liberty to file a fresh suit as there was an alleged defect in the plaint as the petitioner has not prayed for partition and possession also. However, while allowing the petitioner to withdraw the suit the court did not allow it to file a fresh suit to permit it to cure the defect the petitioner claimed to exist in the plaint.

12. This court in *Pain Chancier v. Vashist Kumar, 1973 RLR 311* held as follows

“5. I think there is substance in the argument of the applicant that in a case where an application is made under sub rule (2) of rule 1 of Order Xxiii of the Code for withdrawing it with liberty to file a fresh suit on the lame cause of action and the Court does not grant the requisite liberty, the order to be made is to dismiss the application and not to dismiss the suit. It is not necessary to dilate too much on the subject because it seems so well covered by the authorities. The first case to which reference might be made is reported in *Naru v. Mr. Noji and others* MANU/RH/0018/1959 MANU/RH/0018/1959 where the principle has been well expressed in the following words:

"IF a plaintiff merely desires to withdraw a suit all he has to do is to make an application under sub r. (1) of R. I. of 0.23. But where he applies under sub-rule (2) what he wants is that he should be permitted to withdraw the suit with permission to institute a fresh suit. Therefore, when an application is made under sub-rule (2), it is not open to the court to treat it as if it is an application under sub-r. (1) without any condition and to grant the prayer for withdrawal and refuse the prayer for permission to bring a fresh suit. The prayer under sub-rule (2) must be treated as one whole and the court may either reject the entire prayer, or allow the entire prayer i.e.. permit the withdrawal of the suit with liberty to bring a fresh suit The reason is that if the court grants him the permission to withdraw but refuses the permission to institute a fresh suit, the result would be the plaintiff would be deprived of carrying on with the suit as best as he can and would also not be permitted to file a fresh suit on the same cause of action. It was not the intention of the legislature that the plaintiff should be put to this loss by breaking up the prayer for withdrawal with permission to file a fresh suit about the same subject-matter into two parts."

To the same effect is the case reported in *Thodi Konda Veeraswami V. Thulium fade Lakshmudu & others* A.I.R. 1991 Mad 715 where it is stated.

"WHERE a plaintiff files a petition to withdraw the suit with permission to file a fresh suit regarding the same subject matter, under O 23 R, (2) the Court has got the right to dismiss the petition telling him that he might withdraw the suit if he wants but that it will not give him permission to file a fresh suit regarding the same subject-matter. The court cannot divide the petition into two and accept the withdrawal and refuse the liberty in the same order."

It, Therefore, appears to be clear that in a case where the Court is not granting liberty to file a fresh suit, all that it can do is to dismiss the application praying for withdrawal of the suit with liberty to file a fresh suit and not to dismiss the suit. The suit must proceed to trial from the stage at which the application was made."

13. Similarly, the Allahabad High Court in *Balbir Singh v. Smt.Sulochana Devi*, AIR 1970 ALL 382 held as follows:

"3. I have heard the learned counsel for the parties. There can be no doubt that on the facts and circumstances of the case the learned trial Judge was fully justified in refusing permission to the plaintiff to file a fresh suit or proceeding as he may be advised. It was, however, not open to the learned Judge in law to split up the plaintiff's prayer for withdrawal of the suit with permission to file a fresh suit in two parts. He could have either accepted the application or rejected it in toto. This is obvious from the fact that the plaintiff's prayer to withdraw the probate application was based on his further prayer that he should be permitted to file any other proceeding or suit as he may be advised. It was joint prayer which could have been either accepted or rejected in toto as stated above. The trial Judge, in my opinion, had no jurisdiction to split it up in two parts and to grant one and refuse the other."

14. Hence, the trial court had to either allow the application of the petitioner as prayed for or ought to have dismissed the same if it was not convinced on merits about the same.

15. In view of the above, the impugned order suffers from material illegality and is quashed. The matter is remanded back for the fresh adjudication on the application of the petitioner under Order 23 Rule 1 CPC and the suit at the stage where it was pending.

16. The parties are directed to appear before the trial court on 20.03.2017.

17. In view of the above, the present petition and all pending application stand disposed of.

JAYANT NATH, J

FEBRUARY 16, 2017/rb