

HIGH COURT OF CHHATTISGARH, BILASPURWP227 No.137 of 2015

Ashraf Ahmad Khan, S/o Late Abdul Aziz Khan, Aged about 60 years, R/o Bristol Chowk, Chhotapara, Raipur, District Raipur (CG)
 (Plaintiff)
 ---- Petitioner

Versus

1. Mohd. Saeed Khan, S/o Late Mohd. Majid Khan, Aged about years, R/o In front of R.K. Provisions Stores, House of Jamshed Khan, Bairan Bazar, Raipur, Distt. Raipur (CG)
2. State of Chhattisgarh, Through the Collector, Raipur (CG)
3. New Raipur Development Authority, Through Chief Executive Officer, Near Mahanadi Gate, Mantralaya, Raipur (CG)

(Defendants)
 ---- Respondents

For Petitioner: Mrs.Fouzia Mirza, Advocate
 For Respondent No.1 :Mr.Ankur Agrawal, Advocate
 For State/Respondent No.2: Mr.Adi Raj Surana, Dy.G.A.

Hon'ble Shri Justice Sanjay K. AgrawalOrder On Board16/11/2018

1. Taking exception to legality, validity and correctness of the order dated 9.1.2015 passed by the trial Court rejecting the petitioner's/plaintiff's application under Order 23 Rule 1(3) (a) of the CPC for withdrawal of suit with liberty to file fresh suit, this writ petition has been preferred.
2. The petitioner/plaintiff filed a suit for declaration of title and permanent injunction against defendant No.1 and the State of

Chhattisgarh that he is title-holder of the suit land and defendant No.1 be restrained from interfering with his possession, in which return was filed by respondent No.1/defendant No.1 stating inter-alia that the land has already been acquired by defendant No.2 for the purpose of defendant No.3 and defendant No.1 has already obtained compensation of ₹ 3,12,62,500/-, as such, the suit is barred as no notice under Section 80 (1) of the CPC has been served to defendant No.2 and therefore, the suit is not maintainable. After filing of the written statement, the plaintiff filed an application under Order 23 Rule 1(3)(a) of the CPC for withdrawal of suit with liberty to file a fresh suit as the suit suffers from non-service of notice under Section 80 of the CPC, which is a formal defect within the meaning of said provision, which has been rejected by the trial Court by the impugned order.

3. Mrs.Fouzia Mirza, learned counsel for the petitioner, would submit that the trial Court is absolutely unjustified in rejecting the said application as the suit suffers from formal defect including defect of non-service of notice under Section 80 of the CPC as admittedly the petitioner/plaintiff has served no notice to defendant No.2 before filing of the suit. Therefore, the petitioner/plaintiff be permitted to withdraw the instant suit with liberty to file a fresh suit by setting aside the impugned order.
4. On the other hand, Mr.Ankur Agrawal, learned counsel for respondent No.1 would support the impugned order.

5. I have heard learned counsel for the parties, perused the impugned order and other documents appended with the writ petition.
6. The trial Court rejected the application finding that the defect pointed out by the plaintiff is not formal defect within the meaning of Order 23 Rule 1(3)(a) of the CPC.
7. In order to consider the plea raised at the Bar, it would be appropriate to notice Order 23 Rule 1(3) of the CPC which reads as under: -

“Order XXIII Rule 1. Withdrawal of suit or abandonment of part of 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.”

8. A close, careful and critical reading of the above-stated provision would show that where the Court is satisfied either on the ground 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, the application may be granted by the trial Court with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim. The aforesaid provision confers no power and no jurisdiction to the Court to simply permit the plaintiff to withdraw his suit as the power

conferred by the provisions contained in Order 23 Rule 1 of the CPC has to be exercised on fulfillment of certain conditions mentioned in Order 23 Rule 1(3) (a) & (b). If the condition precedent for exercise of power for withdrawal of suit is not satisfied, the Court would not exercise that power of dismissing the suit without liberty.

9. The Supreme Court in the matter of **K.S. Bhoopathy and others v. Kokila and others**¹ has held as under:-

“13. The provision in Order XXIII Rule 1 CPC is an exception to the common law principle of non suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on a par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the court after satisfying the court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the court but such discretion is to be exercised by the court with caution and circumspection. The legislative policy in the matter of exercise of discretion is clear from the provisions of sub-rule (3) in which two alternatives are provided; first where the court is satisfied that a suit must fail by reason of some formal defect, and the other where the court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the court that it must be satisfied about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the same cause of action. The court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action.”

10. The Supreme Court in the matter of **V. Rajendran and**

¹ (2000) 5 SCC 458

another v. Annasamy Pandian (dead) through legal representatives Karthyayani Natchiar² followed the principle of law laid down in K.S. Bhoopathy (supra) and held that consideration of wrong description of property in the suit is a “formal defect” entitling the plaintiff to grant of such permission. It was observed as under:-

“12. In the present case, the appellants have filed the suit describing the suit property as Survey No.192/9 but the respondents are said to have transferred the patta for the suit property settling as Survey No.192/14. The defect in the survey number of the suit property goes to the very core of the subject-matter of the suit and the entire proceedings would be fruitless if the decree-holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a “formal defect” within the meaning of Order 23 Rule 1(3)(a) CPC. That apart, the respondents are said to have executed an Inam settlement deed on 21-9-2012, in favour of their son Aranmanai Pandian, mentioning the suit property as Survey No.192/14. We are convinced that the case of the appellants would fall under clause (a) of Rule 1(3) CPC.”

11. Now, the question would be whether non-service of notice under Section 80 of the CPC before filing of suit against the State Government would be “formal defect” within the meaning of Order 23 Rule 1(3)(a) of the CPC entitling the plaintiff to withdraw the suit with liberty to file fresh suit.

12. The Supreme Court in the matter of The State of Andhra Pradesh v. Gundugola Venkata Suryanarayana Garu³ has held that the object of the notice under S. 80, Civil P.C. is to give the Government or the public servant concerned an opportunity to

² (2017) 5 SCC 63

³ AIR 1965 SC 11

reconsider its or his legal position and if that course is justified to make amends or settle the claim out of court. The section is imperative and must be strictly construed. Failure to serve a notice complying with the requirements of the statute will entail dismissal of the suit.

13. Likewise, the Supreme Court in the matter of Sawai Singhai v. Union of India⁴ held that Section 80 of the CPC is express, explicit and mandatory and it admits of no implications or exceptions, as such, notice under Section 80 of the CPC is necessary condition precedent for maintaining valid suit,

14. Reverting to the facts of the present case, it is quite vivid that the plaintiff's suit is also against the State Government as compensation has already been determined and paid to defendant No.1 after acquiring the suit land, as such, notice under Section 80 of the CPC is mandatory and the plaintiff's suit would fail in absence of imperative under Section 80(1) CPC notice, as such, defect will constitute to a "formal defect" within the meaning of Order 23 Rule 1(3)(a) of the CPC. The trial Court ought to have permitted to withdraw the suit with liberty to file fresh suit on the same cause of action, as such, the trial Court is absolutely unjustified in rejecting the application as the suit filed by the plaintiff would fall by reason of formal defect of non-service of notice under Section 80 of the CPC.

15. In view of above-stated legal analysis, the impugned order passed by the trial Court deserves to be and is hereby set aside.

4 AIR 1966 SC 1068

Resultantly, the plaintiff is permitted to withdraw his suit with liberty to file afresh suit on the same cause of action in accordance with law.

16. The writ petition is allowed to the extent indicated hereinabove. A copy of this order be sent to the trial Court by e-mail/fax directly as well as through the District Judge concerned and on receipt of this order, the trial Court will pass final order in line with the order passed by this Court. No cost(s).

Sd/-

(Sanjay K. Agrawal)
Judge

B/-