

HON'BLE SRI JUSTICE S.V. BHATT

C.R.P. No.1043 OF 2018

ORDER:

%27.04.2018

Reshavani @ Reshavana Ailaiah

....Petitioner

VERSUS

\$ Macherla Chinna Narasaiah @ Narsinga Rao and others

..Respondents

< GIST:

> HEAD NOTE:

! Counsel for Petitioner : Mr.Challa Sinivasa Reddy

^Counsel for Respondents: Ms.Nimmagadda Revathi

? Cases referred:



HON'BLE SRI JUSTICE S.V. BHATT

C.R.P. No.1043 OF 2018

ORDER:

Heard Mr.Challa Sinivasa Reddy for revision petitioner and Ms.Nimmagada Revathi for respondents.

The plaintiff in O.S No.434 of 2010 in the Court of II Additional Junior Civil Judge is the revision petitioner. The revision petitioner filed suit for perpetual injunction restraining the respondents herein from interfering with revision petitioner's possession and enjoyment of plaint schedule property. The respondents filed written statement and are contesting the suit. The suit is posted for trial and the evidence on plaintiff's side is recorded. The revision petitioner filed I.A. No.793 of 2017 under Order XXIII Rule 1 Sub-Rule 3 of Civil Procedure Code (for short 'CPC') praying for withdrawing the suit with liberty to file a fresh suit. The affidavit filed along with I.A. No.793 of 2017 refers to an incident happened on 20th July,2010 i.e. defendants trying to interfere with the possession and enjoyment of revision petitioner and registration of Crime No.104 of 2010 in P.S. Choppadandi. The affidavit refers to respondents occupying the suit land in the year 2011. It is further averred with the changed circumstances, the revision petitioner is compelled to seek the comprehensive relief of declaration of title, together with recovery of possession of plaint schedule property. The plaint already filed needs amendment and the efforts of the revision petitioner for amendment were unsuccessful, hence, prefers to file separate suit for declaration of title and recovery of possession. Therefore,

I.A.No.793 of 2017 was filed with a prayer to withdraw the suit by granting liberty to file fresh suit.

The respondents object to granting liberty to file fresh suit, and rely on dismissal of I.A. No.523 of 2017 filed by the revision petitioner under Order VI Rule 17 of CPC. The examination of witnesses is over, and no ground to grant permission to file a fresh suit is made out. The respondents state that the revision petitioner can be permitted to withdraw the suit but without leave to file fresh suit.

The Court below through the order impugned in the CRP rejected the prayer to grant liberty to file fresh suit. The Court below referred to the requirements of Order XXIII Rule 1 Sub-Rule 3 clause (b) and held that the liberty now sought for is a deliberate attempt of the plaintiff. The Court below refers to the evidence of PWs 1 to 3 and that the revision petitioner has not mentioned the reasons for filing fresh suit except the allegations as made in the plaint. The lack of diligence in pursuing the present suit led to procrastination of the proceedings. Therefore, it is found by the learned trial Judge that no ground is made out for granting the liberty. Hence the C.R.P.

Mr.Sinivasa Reddy contends that the trial Court committed a serious illegality by refusing to grant liberty and the refusal is contrary to the discretion conferred on a Court by Order XXIII Rule 1(3). According to him, the reason for seeking liberty to file fresh suit is that the revision petitioner has no option except to suffer the alleged interference of respondents herein during the pendency of the suit, instead of proceeding with the trial, for working out

comprehensive reliefs, liberty to file fresh suit was sought under order XXIII Rule 1 (3). The trial Court ought not to refer to evidence and then refuse the liberty to file fresh suit. According to him, the order if allowed to remain, amounts to shutting out remedy or relief to a litigant without adjudication by a Court of law. Once a suit for declaration of title and recovery of possession is filed, all the issues are comprehensively tried and no injustice is occasioned to respondents. He further contends that the only area the trial Court could have exercised its discretion in favour of respondents is to impose costs on the petitioner/plaintiff while granting liberty to withdraw the suit. He prays for setting aside the order and grant liberty to plaintiff to file fresh suit.

Ms. Revathi, on the other hand, contends that the averments in affidavit filed in I.A.No.793 of 2017 are sufficient to refuse the liberty as the petitioner is very lax in prosecuting the suit inasmuch as the petitioner refers to alleged dispossession in 2011. After indulging in luxury litigation for seven years, now application is filed for withdrawing the suit and liberty to file fresh suit. She further contends that though a few aspects on the evidence are referred to by the trial Court, the trial Court did not express a view on the evidence but merely referred to the stage of the suit and declined the liberty to file fresh suit. She prays for dismissing the CRP.

I have perused the record and noted the rival submissions made by the counsel appearing for the parties. The point for consideration in the above circumstances is whether the petitioner

is entitled for leave to file fresh suit for declaration of title and recovery of possession under Order XXIII Rule 1 Sub-Rule 3 of CPC?

The revision petitioner filed the suit for perpetual injunction assuming his prima facie title and possession, and seeking protection of possession from the trial court by way of injunction against respondents. The petitioner avers in the affidavit that the respondents in 2011 dispossessed the petitioner from the plaint schedule property. The steps taken by petitioner for amending the plaint to include prayer for declaration of title and recovery of possession were negatived. This Court is not examining the reasons for refusing the prayer for amendment, for the said order has become final and any how not subject matter of revision. Now the affidavit refers to necessity to file suit for declaration of title and recovery of possession. For the reasons already noted, the prayer to file fresh suit was rejected. Sub-Rules 3 and 4 of Order XXIII Rule 1 read thus:

“(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.”

Under Sub-Rule (3) of Rule 1 of Order XXIII, the Court grants liberty to withdraw the suit or 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, on being satisfied that the suit fails for 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 consequence of withdrawing the suit without liberty to file fresh suit is prescribed under Rule 1 Sub-Rule 4 viz. a party who withdraws the suit without leave of Court is precluded under Rule from instituting fresh suit in respect of such subject matter or such part of the claim. The Court while examining the case for granting liberty is satisfied that the formal defect fails the suit. The clause lays emphasis on the words "formal defect".

The words "formal defect" in the normal parlance connote defects of various kinds not affecting the merits of the case. Thus a formal defect is a defect of form unrelated to the claim of plaintiff on merits. In other words, the expression 'formal defect' means a defect of form and not a defect on the merits of the case.

Under Clause (b), the court is satisfied that there are sufficient grounds for allowing plaintiff to file fresh suit for the same subject matter or a part of claim. The thrust under clause (b) is on the words that the Court is satisfied that there are sufficient grounds for instituting a fresh suit for the same subject matter. The words 'sufficient grounds' have to be given sufficiently wide meaning but not a restrictive meaning. What constitutes sufficient grounds has

been left to judicial discretion of the Court and whether the grounds stated by the plaintiff merit acceptance as sufficient grounds to permit plaintiff to file a fresh suit after removing the defects in the pending suit. Defect in the plaint constitutes sufficient ground for allowing the plaintiff to withdraw the suit with liberty to file fresh suit. The expression 'sufficient grounds' is given wider meaning, but not restricted meaning, so that the right of a party is not prejudicially affected and legal remedy denied without adjudication.

Therefore, the Court while examining whether the suit already filed fails by reason of 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, keeps the legal consequences i.e. shall be precluded from instituting fresh suit under Sub-Rule 4 and appropriate orders are passed. Further as stated above, Sub Rule 3 has two facets, namely, that the Court is required to be satisfied that the suit pending before fails by reason of some formal defect and the formal defect is understood and appreciated by taking note of the subsequent events that changed the frame of suit. Secondly that fresh grounds are available for allowing the plaintiff to institute fresh suit for the subject matter or part of a claim. The scheme of Sub-Rule 3 provides for exit from the contest because of formal defects in the suit. Hence, the Court judiciously applies its discretion both while giving permission to withdraw the suit with liberty to file fresh suit or refuse

liberty. The factors which may weigh with the Court to refuse granting leave to file fresh suit, ought not to be comprehensively stated but as illustration it can be stated that prejudice to defendant or prosecution of vexatious claims etc. are a few illustrations. Hence, this Court keeps in view the fallout under Sub-Rule 4 of Order XXIII of CPC, and exercises the discretion or jurisdiction to grant or refuse to grant leave under Sub Rule 3. In the case on hand, this Court is of the view that the affidavit filed by the petitioner herein discloses that the formal defect in the suit is unworkable prayer and secondly sufficient grounds are shown namely that the petitioner purchased plaint schedule from respondents herein and there is necessity for seeking declaration of title and the relief of recovery of possession. After considering the material on record and applying the discretion conferred on Court by Sub-Rule 3, this Court is of the view that the order impugned in the C.R.P. to the extent of not granting liberty warrants interference and accordingly the order impugned in the C.R.P. is set aside and liberty to file suit is granted.

The C.R.P. is ordered. No order as to costs.

S.V.BHATT, J

Date: 27.04.2018

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