

HONOURABLE SRI JUSTICE P. NAVEEN RAO

CIVIL REVISION PETITION No. 2225 of 2018

Date : 29.8.2018

Between:

Adepu Thirupathamma W/o Narsaiah
aged 76 Years occup Household
R/o Kumarpally Hanamkonda Warangal

Petitioner

And

BHUPATHI SAMPATH KUMAR S/o Veeraiah
aged about 38 years occu: Business
R/o C/o T Vidyasagar Ex
Corporator H o 42 45/1
Kothur Hanamkonda Warangal & others

Respondents

The Court made the following:



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ORAL ORDER:

The plaintiff/petitioner herein through GPA holder filed O S No. 1440 of 2010 for perpetual injunction and mandatory injunction in respect of 446 sq. yards of land situated at Palivelpula Gram Panchayat, having purchased the same under a registered sale deed vide document No. 1714 of 1979 dated 28.6.1979. According to petitioner, the boundaries as per the registered sale deed are North-- Open Plot No.11 of the vendor; South—Plot of Sri Md.Ismail; East—Road; West—Open land of Gaddam Ratnam. According to petitioner respondents 2 to 4 have occupied land towards East and West side and only small portion of the land to an extent of 86 square yards remained in his possession and he therefore intends to file a suit for recovery of possession of the land occupied by respondents towards south. Petitioner/plaintiff further states that there is a formal defect regarding description and identification of her suit schedule property in the plaint which would render the entire proceedings fruitless and therefore to avoid complications, she filed I A No. 983 of 2017 seeking leave of the Court to withdraw the suit with liberty to file fresh suit for recovery of possession. The same has been dismissed by II Additional Junior Civil Judge, Warangal holding that a party cannot be allowed to abuse the process of Court by repeatedly filing suits; that the petitioner does not intend to take leave for any formal defect but the application was filed on apprehension of losing the case. Hence, this revision.

2. Heard learned counsel for petitioner and though notices were served none appeared for respondents.

3. Reading of affidavit filed in support of I A No. 983 of 2017 would show that according to petitioner, major portion of the suit schedule land on which injunction was sought except 86 square yards is not in possession of the

petitioner and petitioner therefore seeks leave of the Court to withdraw the suit and to file separate suit for recovery of possession.

4. Plaintiff averments would go to show that petitioner purchased suit schedule land on 28.6.1979 and ever since he is in possession and enjoyment. While so, the defendants 1 to 3 were making hectic efforts to encroach the suit schedule land, started digging pits on 14.12.2010 to raise RCC pillars. Whereas, now he claims that he is not in possession of suit land, except on 86 square yards and therefore would seek recovery of possession. The suit was instituted in the year 2010. A suit for recovery of possession has to be filed within three years when the right to sue accrues. Whereas, averments in the affidavit filed in support of Interlocutory Application are vague. It is not stated when petitioner was dispossessed from the land claimed by him.

5. To grant mandatory injunction, two primary ingredients required to be satisfied by plaintiff are (i) prima facie title to the property, and (ii) proof of possession as on the date of institution of suit. If what is stated in the affidavit filed in support of the Interlocutory Application is true, it would amount to admission by petitioner that he was not in possession of the suit land even by the time suit was instituted.

6. Further, in the written statement of defendants filed on 28.2.2011, the defendants denied claim of plaintiff on ownership and possession. They have averred that respective extent of land was purchased by them; defendants 1 and 2 constructed houses and third defendant constructed compound wall on land belonging to him and all of them are in possession of respective extents of land forming part of the suit schedule property. It was contended that as plaintiff was not in possession, she ought to have filed suit for recovery of possession and suit for permanent injunction is not maintainable. Thus, even by 28.2.2011, the stand of defendants is known to petitioner/plaintiff.

7. Further, though petitioner sought to contend that there was formal defect, without elaborating, prayer sought is to withdraw the suit with liberty to

institute suit for recovery, but not to cure formal defect. Leave to withdraw under Order XXIII Rule (1) (3) (a) is also only with liberty to institute fresh suit in respect of subject matter of pending suit and such part of the claim but not entirely for a different claim whereas claim of petitioner to institute fresh suit entirely on a different cause of action.

8. In **V. Rajendran and another Vs. Annasamy Pandian (dead) through legal representatives Karthayayani Natchiar**¹, Supreme Court considered scope of Order XXIII Rule 1 (3) of CPC. Supreme Court held:

“9..... As per Order 23 Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. ***The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 Rule 1(3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b), that is, existence of a “formal defect” or “sufficient grounds”.*** The principle under Order 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

10..... The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order 23 Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. ***“Formal defect” is a defect of form prescribed by the rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, misjoinder of parties, failure to disclose a cause of action, etc. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.***

(emphasis supplied)

9. From the narration of facts by plaintiff, it is apparent that there was no confusion regarding identification of the suit property plaintiff now claims that defendants entered into possession of the suit land leaving only 86 square yards and therefore seeks leave of the Court to file suit for recovery. Thus, it is not a case of ‘formal defect’.

¹ (2017) 5 SCC 63

10. The averments of plaintiff on alleged encroachment by defendants are not clear but apparently sought to contend as post institution of suit. To appreciate this, it is relevant to note averments in written statement. Defendants assert that even before suit was instituted, they were in possession and therefore objected to prayer to grant mandatory injunction. Further, apparently plaintiff earlier filed O S No. 1020 of 2009 praying to grant perpetual injunction on the self-same property and same was dismissed for default. These are factors which weighed with the trial Court to reject the application.

11. Order XXIII Rule 1 (3) of CPC vests discretion in the trial Court to grant leave to withdraw the suit and to grant liberty to institute fresh suit in respect of subject matter of such suit. Revisional jurisdiction of the Court is intended only to correct patent errors by trial Court. The trial court discussed all contentions in detail and by assigning reasons in support of its decision, did not accept the prayer of petitioner to withdraw the suit with liberty to institute another suit. This Court does not see any error in the discretion exercised by trial Court. It is a well-considered decision and do not warrant interference.

12. Revision fails and is accordingly dismissed. No costs. Pending Miscellaneous Petitions are closed.

DATE: 29-08-2018
TVK

P NAVEEN RAO,J

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