

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.6134 of 2018

ORDER:

The challenge in this revision, under Article 227 of the Constitution of India, is to the order, dated 15.09.2018, of the learned Junior Civil Judge, Nagari, Chittoor, passed in IA.No.118 of 2018 in OS.No.39 of 2012.

1.1 The said IA is filed by the revision petitioner-plaintiff, under Order XXIII Rule 1(3) of the Code of Civil Procedure, 1908 [the 'Code', for brevity] requesting the Court to permit the plaintiff to withdraw the said suit with liberty to institute a fresh suit in respect of the same subject matter and on the same cause of action.

2. I have heard the submissions of Sri P. Gangarami Reddy, learned counsel, appearing for the revision petitioner-plaintiff. Though the respondents-defendants are served with notices, they did not enter appearance.

3. The facts, which are necessary to be stated as a prelude to this order, in brief, are as follows: - 'The plaintiff filed the suit for declaration of title in respect of the plaint schedule property. The defendants filed written statement resisting the suit. Before the commencement of the trial, the plaintiff filed the above IA for permission to withdraw the suit and institute a fresh suit in respect of the same subject matter and on the same cause of action. The defendants, having not filed any counters, have not resisted the said application. However, by the order impugned, the trial Court

dismissed the said application of the plaintiff. Hence, the plaintiff is before this Court.'

4. The case of the plaintiff in support of the request afore-stated, in brief, is this: - 'The suit is posted for commencement of trial. There is a typographical mistake, which occurred at the time of preparation of plaint, in respect of one of the boundaries of the plaint schedule property and also in not adding the other survey numbers in the schedule of the plaint. As such, the plaintiff filed IA.No.189 of 2014 under Order VI Rule 17 of the Code for rectification of the said mistakes. The said application was dismissed. The plaintiff came to know of the dismissal of the said application recently. However, he could not file a revision against the orders in the said IA as he had no knowledge of the orders passed in that application. As such, he filed the present interlocutory application to permit him to withdraw the suit with liberty to institute a fresh suit.'

5. As already noted, no counter is filed by the defendants.

6. Learned counsel for the plaintiff submits as follows:

In the schedule of the plaint, certain mistakes with regard to description of one of the boundaries and non-mention of certain survey numbers had occurred due to typographical mistakes. Therefore, the plaintiff filed an interlocutory application for amendment of the plaint. The said application was dismissed. In the circumstances stated in his affidavit, the plaintiff could not prefer a revision against the said orders dismissing the application for amendment of the plaint. The said defects in the plaint schedule are formal defects. Even otherwise, they can be

considered as mistakes analogous to formal defects. The defect in the plaint schedule goes to the very core of the subject matter of the suit; and, if the suit is prosecuted with the incorrect description of the plaint schedule property, the decree that may be granted would be fruitless as with the defects in the schedule, plaintiff, even in the event of his success, may not be able to successfully execute the decree. The word '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. The trial Court having not allowed the plaintiff to amend the plaint, further did not allow the plaintiff to withdraw the suit and did not accord permission to institute a fresh suit though the power to allow withdrawal of a suit is discretionary and there existed formal defects in the plaint and sufficient grounds are made out.

6.1 In support of his contentions, learned counsel placed reliance on a decision of the Supreme Court in **V. Rajendran and another v. Annasamy Pandian**¹. It is pertinent to note that in this decision, the Supreme Court dealt with the provision of Order XXIII Rule 1(3) of the Code and the public policy on which the said provision is founded and further referred to the decision in **K.S.Bhoopathy v. Kokila**², wherein certain instances which can be considered as 'formal defect' or 'sufficient grounds' like – "want of notice under Section 80 of the Code, 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 etcetera" were referred to and it was held that 'formal

¹ (2017) 5 SCC 63

² (2000) 5 SCC 458

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. In the decision in Bhoopathy (2nd supra), the Supreme Court dealt with the interpretation of the words 'sufficient grounds' and the possible two views in interpretation of the said words.

7. I have given earnest consideration to the facts and submissions.

8. From the pleadings and submissions made, the following facts are discernable: "The plaintiff brought the suit for declaration of title and other reliefs in respect of immovable property mentioned in the schedule of the plaint. His specific case is that due to typographical mistake a boundary of the plaint schedule is wrongly described and that certain survey numbers, which are to be added in the plaint schedule, were not added and that, therefore, an application for amendment was filed and that the same was dismissed by the trial Court and that the said order has become final and hence, he is left with no option but to withdraw the suit and institute a fresh suit in respect of the same subject matter and on the same cause of action. It is his further case that if he is compelled to prosecute the suit without correcting the mistakes in the schedule confusion will prevail with regard to identification of the suit property and hence, the present application for withdrawal of the suit with liberty to institute a fresh suit at a later point of time is filed. Be that as it may."

9. A perusal of the order of the trial Court reflects that for lack of diligence and delay on the part of the plaintiff in filing the subject interlocutory application, the trial Court dismissed the said application of

the plaintiff. The trial Court also observed in its order that applications after applications were filed and that the plaintiff to the maximum extent has been protracting the proceedings and that the plaintiff cannot be permitted to withdraw the suit and institute a fresh suit as the claim made in the application does not reflect that there is a formal defect as envisaged under Order XXIII Rule 1(3) of the Code.

10. As rightly contended by the learned counsel for the plaintiff, the defect in the plaint schedule goes to the very core of the subject matter of the suit and that the entire proceedings would become fruitless in the event the plaintiff is not able to get the decree executed successfully on account of the defect in the plaint schedule and confusion regarding identification on account of the defects in the plaint schedule, which are not permitted to be corrected, by way of amendment of the plaint. Therefore, in the light of the legal position enunciated in the cited decision, in the considered view of this Court, the defects pointed out by the plaintiff constitute a 'formal defect' within the meaning of Order XXIII Rule 1(3) of the Code. Further, the defendants did not oppose the request of the plaintiff before the trial Court. They are also not opposing the present revision of the plaintiff before this Court. In the facts & circumstances of the case, this Court considers that the submissions made in the application are sufficient grounds to hold that the suit suffered from a 'formal defect' and therefore, the present case is a fit case to allow the plaintiff to withdraw the suit with permission to institute a fresh suit.

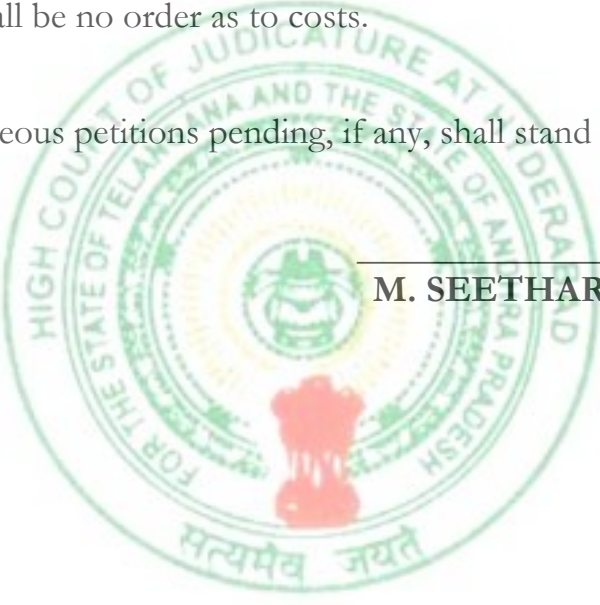
11. As a sequel to the said finding, this Court finds that the order impugned of the trial Court is unsustainable under facts and in law and is liable to be set aside.

12. In the result, the Civil Revision Petition is allowed and the impugned order is set aside. As a sequel, IA.No.118 of 2018 in OS.No.39 of 2012 on the file of Junior Civil Court, Nagari, is allowed and permission is accorded to the plaintiff to withdraw the suit with liberty to institute a fresh suit in respect of the same subject matter and on the same cause of action.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

13.12.2018
Vjl

M. SEETHARAMA MURTI, J