

HIGH COURT OF CHHATTISGARH, BILASPUR**WP227 No.887 of 2018**

1. Anurag Sharma S/o Late Shri Patangu Sharma, aged about 53 years.
2. Asharani Sharma, W/o Late Shri Patangu Sharma, aged about 81 years.
3. Abhijeet Sharma, S/o Late Shri Patangu Sharma, aged about 55 years.
4. Aparjita Pandey, W/o Arvind Pandey, aged about 57 years.

All are residents of HIG-1/142, Sector – 1, Pandit Deen Dayal Upadhyay Nagar, Raipur, Tahsil & District Raipur (CG)

---- Petitioners

Versus

1. Sushma Sharma W/o Late Shri Amitabh Sharma
2. Achyut Tiwari, S/o Late Shri Amitabh Sharma
3. Achintya Tiwari, minor, through the natural guardian mother Sushma Sharma, W/o Late Shri Amitabh Sharma

All are residents of C/o Prafull Sharma, Baniya Para, Purani Basti, Raipur, Tahsil & Dist. Raipur (CG)

4. Chhattisgarh Housing Board, through the Estate Officer, Division-1, Kabeer Nagar, Raipur, Tahsil & District Raipur (CG)

---- Respondents

For Petitioners	:	Mr.B.D.Guru, Advocate
For Respondents No.1 to 3	:	Mr.V.R.Tiwari, Advocate
For Respondent No.4	:	Mr.Sanjay Patel, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal

Order on Board

09.01.2019

1. Legal representatives of original plaintiff-Shri Patangu

Sharma/petitioners take exception to the impugned order dated 27.9.2018 passed by the trial Court by which their application under Order 23 Rule 1 of the CPC for withdrawal of suit with liberty to file a fresh suit on the same subject has been rejected by the trial Court.

2. Mr.B.D.Guru, learned counsel for the petitioners, would submit that the trial Court is absolutely unjustified in rejecting the application as their case is covered by Order 23 Rule 3(b) of the CPC and there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of claim, which ought to have been granted by the trial Court as continuance of the present suit after rejecting the application for amendment on 3.8.2018 would nothing but formal defect in the suit and the suit is bound to fail, as such, such permission to withdraw the instant suit with liberty to file a fresh suit in respect of the subject-matter of the suit or part of the claim be granted in favour of legal representatives of the plaintiff.
3. Mr.V.R.Tiwari, learned counsel for respondents No.1 to 3/defendants, would submit that the trial Court is absolutely justified in rejecting the application as legal representatives of the plaintiffs are proposed to file the suit amending the present cause of action to file a fresh suit with different cause of action, therefore, no exception can be taken to the impugned order passed by learned trial Court rejecting the application.
4. Mr.Sanjay Patel, learned counsel for respondent No.4, would support the impugned order.

5. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.
6. Original plaintiff-Shri Patangu Sharma filed a suit for declaration of title and permanent injunction stating inter-alia that he is real owner of the suit house and his son late Shri Amitabh Sharma was only ostensible owner and widow, sons and daughter and defendants No.1 to 3 have no right and title over the suit property and therefore, a decree of declaration be granted in his favour. During pendency of the suit, original plaintiff-Shri Patangu Sharma died on 14.3.2017 and the present petitioners were brought on record. Petitioner No.4- Aparjita Pandey filed an application under Order 6 Rule 17 of the CPC that her father has executed Will in her favour on 24.5.2002 as mentioned in para-7 of the plaint, therefore, she has become title-holder of the suit property and sought amendment after para-10 of relief cause that she is sole owner of the suit property. That application was rejected by the trial Court by order dated 3.8.2018 giving cause of action in favour of legal representatives of the plaintiff to file an application to withdraw the instant suit with liberty to file a fresh suit in respect of the subject-matter of the suit stating that there is formal defect in the suit and if permission is not granted, the suit is likely to fail, which has been rejected by the trial Court holding that the application under Order 6 Rule 17 of the CPC has already been rejected on 3.8.2018.

7. In order to consider the plea raised at the Bar, it would be appropriate to notice Order 23 Rule 1 and Rule 3 (a) and (b) of the CPC which states as under:-

“1. Withdrawal of suit or abandonment of part of claim.”-(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without leave of the Court.

(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 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. Grant of leave envisaged under sub-rule (3) of Rule 1 of Order 23 of the CPC is at the discretion of the Court but such discretion of the Court 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. (See K.S. Bhoopathy and others v. Kokila and others¹).

9. The object of sub-rule (3) is that there may be certain technical matters on account of which the suit may fail either the plaintiff may have good cause on merits and therefore, there would be failure of

¹ AIR 2000 SC 2132

justice, hence the Court must apply its mind with withdraw with liberty to file a fresh one.

10. In Balide Kamayya v. Pragada Papayya² the Madras High Court has held that “the expression 'other sufficient grounds' occurring in clause (b) of Order 23, Rule 1(2), C.P.C. is not necessarily restricted to defects of a formal character but is wide enough to embrace other defects as well”.

11. The aforesaid decision has been followed by the High Court of Orissa in the matter of Brajamohan Sabato v. Sarojini Panigrahi and another³ in which it has been held that mistake by plaintiff in not seeking proper relief, it is sufficient ground for granting permission to withdraw with liberty to file fresh suit.

12. Reverting to the facts of the present case, it is quite vivid that in the instant suit after original plaintiff died his legal representatives having been brought on record including one petitioner No.4- Aparjita in whose favour Will is said to have been executed and petitioner No.4 sought to amend the relief clause in the plaint claiming the suit property to be the exclusive property of her own, which was declined by the trial Court necessitating the withdrawal of the suit with permission to file a fresh suit as after death of her father, in relief clause, no proper relief has been sought, which in the considered opinion of this Court, is sufficient ground covered by Order 23 Rule 3(b) of the CPC for granting permission to withdraw the suit with liberty to file a fresh suit in respect of the subject-matter

² AIR 1918 Mad 1287

³ AIR 1975 ORISSA 39

of the suit or part of the claim.

13. In view of above, the impugned order is set aside. The petitioners are permitted to withdraw the suit with liberty to institute a fresh suit in respect of the subject-matter of the suit or part of the claim subject to payment of cost of Rs.2500/- to defendants No.1 to 3. It is stated at the Bar that counter-claim is said to have been filed. It will continue without being prejudiced by this order.
14. The writ petition is allowed to the extent indicated hereinabove. No cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-