

THE HON'BLE Dr. JUSTICE SHAMEEM AKTHER

CIVIL REVISION PETITION No.628 OF 2019

ORDER:

This revision, under Article 227 of the Constitution of India, is filed by the petitioner aggrieved by the order dated 12.02.2019 passed in I.A.No.1739 of 2018 in O.S.No.417 of 2010 by the learned XXV Additional Chief Judge, City Civil Court, Hyderabad, wherein the application to file fresh suit with the same cause of action, was dismissed.

2. Heard learned counsel for the revision petitioner, learned counsel for the respondents and perused the record.

3. Learned counsel for the revision petitioner would contend that some structures were changed in the suit schedule property pending the suit. Therefore, application was filed seeking permission of the Court below not to press the suit with liberty to file a fresh suit with the same cause of action. The Court below erroneously dismissed the said application.

4. On the other hand, learned counsel for the respondents would contend that there is no formal defect. The relief sought by the revision petitioner does not fall under the provisions of Order 23 Rule 1(3) of CPC. The Court below had rightly dismissed the application. Learned counsel relied on the decisions reported in *Debashis Singha Roy v. Tarapada Roy*¹ and *V.Rajendran v. Annasamy Pandian*².

¹ LAWS(CAL) 2000 4 22

² (2017)5 SCC 63

5. In view of the submissions made by both sides, the point for determination is:-

Whether the revision petitioners are entitled for the relief as prayed for?

6. In view of the mandate given under Order 23 Rule 1(3) of CPC, the revision petitioner has to substantiate that there is a “formal defect” in the suit and he is entitled to file a fresh suit based on same cause of action. As per the submissions and the material placed on record, the subject suit property was changed and that change disabled the revision petitioner to seek the relief of partition and separate possession of his 1/6th share.

7. In the course of submissions, it is brought to the notice of this Court that the application filed under Order 39 Rules 1 and 2 of CPC by the revision petitioner was dismissed and consequently CMA was filed and was withdrawn. Further, the amendment application was filed by the revision petitioner and the same was also dismissed.

8. In the decision relied on by the learned counsel for the respondent in *Debashis Singha Roy's case* (supra 2), at para No.9, it was held as under:

“In the case in hand the plaintiffs/petitioners filed the suit for partition of alleged joint family properties. The petition for temporary injunction filed by the plaintiffs/petitioners was dismissed by the trial Court. Such dismissal of the injunction petition was upheld by the Court of appeal. In view of the public policy underlying the Order 23 Rule 1(3) of the Code to prevent institution of suit again and again on same cause of action, even the defendants of this suit may either have the properties in suit partitioned between them and the plaintiffs if such are the joint properties or may establish the same to be their exclusive properties or that the plaintiffs do not have any share therein. In either case the disputes, if there be any, shall be set at rest. The plaintiffs therefore in this case should not be allowed to withdraw the suit with leave to sue afresh on the subject matter of the suit only for the purpose of keeping alive the dispute between the parties, to be reopened at the discretion of the plaintiffs. The apart

the defects as alleged in the petition under Order 23 Rule 1(3) of the Code by the plaintiffs, on the stated principles are not formal defects as either of the parties to the suit may have such defects, removed by making appropriate application in the suit itself.”

In *V.Rajendran’s* case (supra 3), at para 10, it was held as under:-

“In *K.S.Bhoopathy v. Kokila*³, it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or “sufficient grounds”, such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. 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”.

The above judgments reflect that the application filed under Order 23 Rule 1(3) of CPC has to satisfy the existence of “formal defect” or “sufficient grounds”. Some of the formal defects are enumerated in the judgment reported in *K.S.Bhoopathy’s* case (supra 4), i.e., 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. Further, it is held that “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.

9. In the instant case, the change alleged to have been made is construction of structures over the suit property. So it would not lead

³ 2 (2000)5 SCC 458

to “formal defect” of the plaint. The revision petitioner ought to have sought permission to make amendments. Therefore, the requirements of Order 23 Rule 1(3) of CPC have not been complied with. The Court below had elaborately dealt with the matter and declined the relief sought by the revision petitioner. The Court below acted well within its jurisdiction. It did not commit any illegality or perversity to interfere with the impugned order. The revision petition is devoid of merit and is liable to be dismissed.

10. In the result, the Civil Revision Petition is dismissed.

The Miscellaneous Petitions, if any, pending shall stand closed.

No costs.

Date: 28.10.2019
ssp

Dr. SHAMEEM AKTHER, J

