
(2014) 02 MP CK 0104
In the Madhya Pradesh High Court
Case No : Writ Petition No. 7206 of 2012

Munne Khan

APPELLANT

Vs

Bhagchand and Another

RESPONDENT

Date of Decision : 24-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3), Order 6 Rule 17

Constitution of India, 1950 — Article 227

Citation : (2014) 02 MP CK 0104

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : S.K. Shrivastava, for the Appellant; R.K.S. Kushwaha, Advocate for the Respondent No. 1, for the Respondent

Final Decision : Partly Allowed

Judgement

Sujoy Paul, J.—This petition filed under Article 227 of the Constitution challenges the order dated 6.8.2012 passed by Civil Judge, Class-I, Sironj, District Vidisha in case No. 63-A/2011. Admitted facts between the parties are that the respondent No. 1/plaintiff initially filed a suit for declaration, possession and recovery of rent against the defendant. Written statement was filed. Issues were framed and thereafter, an application under Order 6 Rule 17 CPC was filed by the plaintiff on 4.5.2012. The petitioner/defendant filed reply and opposed the amendment. The Court below allowed the amendment application by impugned order dated 6.8.2012. The Court below opined that under Order 23 Rule 1 CPC, plaintiff can abandon any part of relief. It is held that if a larger relief is claimed and a portion thereof is abandoned, no prejudice would be caused to the other side.

2. The case of the petitioner is that the amendment application was not maintainable because it was filed after commencement of the trial. No "due diligence" was shown and established by the plaintiff. Necessary ingredients of

Order 23 Rule 1 C.P.C. were not satisfied and Court has mechanically allowed the amendment application.

3. Per contra, Shri R.K.S. Kushwaha, learned counsel for the respondent/plaintiff submits that merely because the application Annexure P-5 is erroneously filed under Order 6 Rule 17 C.P.C., the Court is not denuded to exercise its power which can be traced from Order 23 Rule 1 C.P.C. He submits that the argument of other side is hyper technical and misconceived.

4. I have heard the learned counsel for the parties and perused the record.

5. In the opinion of this Court, the amendment application and the application preferred under Order 23 Rule 1 C.P.C. needs to be considered/examined by applying different principles. This is also settled in law that after insertion of proviso to Order 6 Rule 17 C.P.C., the amendment prayed for before commencement of trial and after commencement of trial needs to be examined on different yardsticks. As held in *Vidyabai and Others Vs. Padmalatha and Another*, , the trial commences when issues are framed and matter is fixed for evidence. In the present case, admittedly, the issues were framed and trial has already commenced before filing of amendment application. Proviso to Order 6 Rule 17 mandates that in the event amendment application is filed after commencement of trial, the party claiming amendment must show his "due diligence". It must be established as to why this amendment could not be prayed for before the commencement of trial or could not form part in the plaint/written statement itself, as the case may be.

6. In *Vidya Bai (supra)*, the Apex Court opined that after commencement of trial, unless party claiming amendment establishes the element of "due diligence", the Court has no jurisdiction to deal with and allow the amendment.

7. In the present case, the plaintiff has not shown any reason for belatedly filing the amendment application. In other words, the plaintiff has not shown "due diligence" in filing the application after commencement of the trial. Thus, the amendment application cannot be entertained after commencement of the trial. In absence of establishing jurisdictional fact, the Court below has erred in considering and deciding the amendment application.

8. The alternative argument of Shri Kushwaha is that on technical grounds the amendment cannot be disallowed because the power of the Court to allow such relief can be traced from Order 23 Rule 1 C.P.C. It is apt to quote order 23 Rule 1 C.P.C. 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 the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(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 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.

9. A bare perusal of Order 23 Rule 1(3), it is clear that the Court is required to be "satisfied" on the factors mentioned, i.e., "(a) (b)". In the considered opinion of this Court, the Court below has not applied its mind on the application preferred under Order 23 Rule 1 C.P.C. A suit cannot be permitted to be withdrawn, nor part of claim can be permitted to be abandoned on mere asking. One has to fulfill the requirement of this provision. In other words, permission to abandon the relief or withdrawal cannot be mechanically granted. Availability of condition (a) or (b) mentioned in sub-rule 3 and courts' satisfaction on such availability is necessary.

10. This Court in Uma Devi and Another Vs. Nagarpalika, Begamgunj and Others, opined that, the plaintiff must show that the requirement of Order 23 Rule 1(3) of CPC are satisfied.

11. In K.S. Bhoopathy and Others Vs. Kokila and Others, , the Apex Court held that, the provision in Order XXIII, Rule 1, C.P.C. is an exception to the common law principle of non-suit. Therefore on principle an application by a plaintiff under sub-rule (3) cannot be treated on par with an application by him in exercise of the absolute liberty given to him under sub-rule (1). In the former it is actually a prayer for concession from the Court after satisfying the Court regarding existence of the circumstances justifying the grant of such concession. No doubt, the grant of leave envisaged in sub-rule (3) of Rule 1 is at the discretion of the Court but such discretion 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, (1) where the Court is satisfied that a suit must fail by reason of some formal defect, and the other where the Court is satisfied 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. Clause (b) of sub-rule (3) contains the mandate to the Court that it must be "satisfied" about the sufficiency of the grounds for allowing the plaintiff to institute a fresh suit for the same claim or part of the claim on the

same cause of action. The Court is to discharge the duty mandated under the provision of the Code on taking into consideration all relevant aspects of the matter including the desirability of permitting the party to start a fresh round of litigation on the same cause of action.

12. In Somaraju Chinnammi Vs. Samanthu Sivaji Ganesh and Another, , the High Court of Andhra Pradesh opined that, the language of sub-rule (3) of Rule 1 shows that such permission to withdraw the suit with liberty to institute a fresh suit in respect of the same subject-matter can be granted only where the Court is "satisfied" that a suit must fail by 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.

13. If the impugned order is tested on the basis of principle laid down in the aforesaid judgments, it will be clear that the Court below has not examined the circumstances and necessary ingredients for exercising power under Order 23 Rule 1 C.P.C. The order of Court below suffers from manifest procedural impropriety, which runs contrary to the mandate and requirement of Order 23 Rule 1 C.P.C. Since the permission for abandoning the relief or withdrawing the suit cannot be granted in a routine and mechanical manner, I deem it proper to set aside the order impugned by reserving liberty to the plaintiff to file appropriate application under Order 23 Rule 1 C.P.C.

14. Resultantly, the impugned order is set aside. Liberty is reserved to the plaintiff to file appropriate application as aforesaid. Petition is allowed to the extent indicated above.