
(1997) 12 AP CK 0032
In the Andhra Pradesh High Court
Case No : CRP No. 4880 of 1997

Obulapuram Venkat Subba Reddy	APPELLANT
Vs	
Assistant Engineer, A.P. Housing Board and Another	RESPONDENT

Date of Decision : 31-12-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 9, Order 22 Rule 10, Order 23 Rule 1, 115

Citation : (1998) 2 ALD 33 : (1998) 1 ALT 613

Hon'ble Judges : V. Rajagopala Reddy, J

Bench : Single Bench

Advocate : Mr. R.V. Subba Rao, for the Appellant; Mr. C. Sadasiv Reddy, for the Respondent

Judgement

1. The only question that arises in this CRP is whether the plaintiff is entitled to withdraw the suit against any one of defendants under Order 23 Rule 1 of CPC (for short "the Code").
2. The petitioner is the plaintiff in OS No.472/96 on the file of the IV Addl. District Munsif, Cuddapah. He filed the suit for permanent injunction against the 1st respondent herein, the sole defendant in the suit. Thereafter, pending the suit, the 2nd respondent herein, filed an application under Order 1 Rule 10 of the Code to implead him as the 2nd defendant, as he is a necessary and proper party to the suit. He was accordingly impleaded by an order in IA No.841/96. The petitioner questioned the said order in CRP 2505/97 before this Court, but failed to succeed. Thereafter, the plaintiff-petitioner came forward with an application under Order 23 Rule 1 of the Code for withdrawal of the suit against the 2nd respondent-D2, who has been impleaded as stated supra. The Court below dismissed the application by the impugned order. Questioning the said order, the CRP is filed.
3. It is contended by the learned Counsel for the petitioner that the plaintiff being the dominus litis is entitled to withdraw the suit against all or any of the

defendants. Order 23 Rule 1 of the Code recognises such right. Hence, the impugned order is wholly erroneous and offends Order 23 Rule 1 of the Code. In support of his contention, learned Counsel relied upon the decisions in *Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co.*, and *Masulipatam Municipality Vs. Rallabhandi Venkatappayya and Others*, .

4. Learned Counsel for the 2nd respondent resisted the contentions of the petitioner, stating that the 2nd respondent having been impleaded as D2, on the ground that he was a necessary party to the suit, the suit cannot be abandoned against him. It is further contended that permission cannot be granted in view of Order 1 Rule 9 and Rule 10 which state that non-joinder of necessary parties entail the dismissal of the suit. The decisions cited above have been rendered prior to the introduction of the proviso to Order 1 Rule 9 of the Code.

5. The 1st defendant in the suit was the A.P. Housing Board. The petitioner filed the suit against it for permanent injunction restraining it from demolishing the construction made by the plaintiff. The 2nd respondent came on record as the 2nd defendant on the application filed by him. The ground on which the 2nd respondent was impleaded as a party was that he was a necessary and proper party to the suit. The petitioner could not succeed in the CRP filed by him against the said order. Thus, the order has become final. Thus it has to be held that the 2nd respondent (D2) is a necessary party to the suit. Since the petitioner failed in his attempts to see that the 2nd respondent should not be impleaded, he has adopted the ingenious method by filing the present petition for withdrawal of the suit against the 2nd defendant. The Court below rejected the application on the ground that the 2nd defendant was a necessary party to the proceedings, for proper adjudication of the matter and without his presence the suit cannot be properly disposed and the application therefore was not bonafide and it was made only to defeat the order impleading the 2nd defendant. There is no difficulty in seeing through the game of the petitioner. He does not want the 2nd respondent to be on record in his suit. But the question remains whether the petitioner has got a right conferred by the provisions of Order 23 Rule 1 of the Code to withdraw the suit against R2. A reading of Order 23 however, lends force to the contention of the petitioner. The decision in *H.R. Baij Nath* case (*supra*) also shows that the plaintiff has got unqualified right to withdraw his suit if no permission to file a fresh suit is sought for, he however becomes liable for such costs as may be awarded, and that there is no provision in the Code which requires the Court to refuse permission to withdraw the suit and to compel the plaintiff to proceed with the same.

6. But it should be noticed that the proviso has been added to Order I Rule 9 of the Code by the Act 104/76, which reads thus :

"Provided that nothing in this rules shall apply to non-joinder of necessary party."

Hence, the reading of Rule 9 along with the proviso makes it clear that a suit is liable to be dismissed by reason of non-joinder of necessary party. A necessary

party is one in whose absence a dispute involved in the suit cannot be adjudicated. In his absence, therefore, it may not be possible to pass an effective decree in the suit. It is evident from a reading of the order in TA 841/96, dated 3-4-1997, passed by the Court below allowing the application to implead the 2nd respondent as the 2nd defendant in the suit, that he was a necessary party to the suit. The said finding was not disturbed by this Court" in CRPNo.2505/97. Thus, it was held by me, supra, that the 2nd respondent is a necessary party to the suit. If such is the case, can a suit be withdrawn against the necessary party, without the rendering suit liable for dismissal? As all the attempts made by the petitioner in resisting the application to implead the 2nd respondent as a party failed, is it permissible for the petitioner to adopt a device defeating the orders of the Court and successfully excluding the 2nd respondent from the suit? I am of the view that the petitioner cannot be permitted to do so. The right given to the party under Order 23 Rule 1 of the Code has to be necessarily viewed in the context of the facts of each case. The said right cannot be permitted to be mis-utilised to defeat the other provisions of the Code (Order 1 Rule 9 and Rule 10 CPC).

7. As seen supra, a suit for non-joinder of necessary party is liable to be dismissed under Order 1 Rule 9 of the Code. If the suit is withdrawn against the necessary party, no effective decree can be passed in the suit itself against other party. The instant suit was filed restraining the 1st respondent from demolishing the construction made by the petitioner on the South-Eastern corner of the house. Obviously for the reason that the 2nd respondent has interest in the suit claim, he was impleaded. It appears from the facts of the case that if a decree is passed allowing the suit, R2 may not successfully question it in a separate suit. Hence, in view of Order 1 Rule 10, Order t Rule 9 of the Code, withdrawal of the suit against the 2nd respondent cannot be permitted, if permitted it should result in dismissal of the suit straightaway. In the decision cited by the learned Counsel for the petitioner in R. Venkatappayya's case (supra), the learned Judges relying upon the decision in See that Achi v. Mayappa Chettiar, AIR 1934 Mad. 337, observed:

"(8) In disposing of applications under Order 23 Rule 1 CPC, the suit is not terminated and that in appropriate cases the provisions of Order 1 Rule 10 or Order 22 Rule 10 CPC may be applied.

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(11) Though we are inclined to follow the decision of the Madras High Court in ILR 57 Mad. 892; (AIR 1934 Mad. 337), that the Court has jurisdiction to exercise the power under Order 1 Rule 10 CPC, in appropriate cases we are loath on the particular facts of this case to interfere with the discretion exercised by the Subordinate Judge in relegating the 4th defendant to his remedy by way of a separate suit. We are also definitely of the view that on payment of the legacy amount due to the plaintiff, he was entitled to withdraw the suit."

8. The above decision is a clear indication, in support of my view, that in view of Order 1 Rule 9, Rule 10 of the Code, withdrawal of the suit against the 2nd respondent, who was found to be necessary party, entails the dismissal of the suit itself. Hence, in view of the above finding, the application of the petitioner to withdraw the suit filed against the 2nd respondent was rightly rejected.

9. Further the contentions raised by the learned Counsel for the petitioner do not raise any error of jurisdiction. Considering the application filed by the petitioner, the Court below has rejected the same on the ground that in the context of the facts of the case the petitioner could not be permitted to withdraw the suit under Order 23 Rule 1 of the Code. There is, therefore, no error of jurisdiction in the order of the Court below. u/s 115 of the Code this Court will not interfere with any order which is not vitiated by error of jurisdiction. Thus, the CRP is liable to be dismissed on this ground also.

10. The CRP is, therefore, dismissed. No costs.