

(2005) 06 AP CK 0021
In the Andhra Pradesh High Court
Case No : C.R.P. No. 1994 of 2005

Pillakathuku Subbarathnam and Another	APPELLANT
Vs	
Executive Officer, Polathala Malleswaraswamy Temple and Others	RESPONDENT

Date of Decision : 16-06-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(1), Order 23 Rule 1(2), Order 23 Rule 1(3), Order 33 Rule 1

Citation : (2005) 5 ALD 75 : (2005) 4 ALT 423

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : K.G. Krishnamurthy, for the Appellant; None appeared, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—The petitioners-plaintiffs in I.A No. 1123 of 2004 in O.S. No. 24 of 2000 on the file of Senior Civil Judge, Kadapa, aggrieved by the order dated 14-2-2005 had preferred the present revision petition. Notice before Admission was ordered and the respondents were served, but, none represents them.

2. The petitioners/plaintiffs moved an application in I.A. No. 1123 of 2004 in O.S. No. 24 of 2000 on the file of Senior Civil Judge, Kadapa under Order XXIII Rule 1, read with Section 151 of the CPC (for short "the Code") praying this Court to permit them to withdraw O.S. No. 24 of 2000 with a liberty to file fresh suit.

3. It was stated in the affidavit filed in support of the application that the suit was originally drafted by one Sri K. Krishna Murthy, Advocate in which there were certain serious defects in the pleadings and also in the reliefs prayed for. In view of the fact that the suit was not properly framed, the subsequent counsel Sri N. Krishna Murthy while preparing examination-in-Chief affidavit having gone through the records, advised that the plaint was not properly drafted and no

purpose would be served in praying for amendment since amendment would be of substantial nature and hence advised that withdrawal of the suit reserving liberty to file fresh suit would be just and proper. It is also stated that the plaintiffs are illiterates and not having sufficient legal knowledge and just they followed the advice of the counsel.

4. A counter was filed opposing the matter. It was stated that the application is a vexatious one and only with a view to harass the respondents this application was thought of. It was also stated that the senior paternal uncle of the petitioners, namely, P. Ayyavaru had filed O.S. No. 90 of 1999 on the file of III Additional Junior Civil Judge, Kadapa for the same relief and after temporary injunction application was dismissed in the suit, the said Ayyavaru got the present application filed in the present suit. Certain other objections had also been taken.

5. The learned Judge recorded certain reasons and observed that it is not a formal defect and the plaintiffs cannot be permitted to file fresh suit. Since the plaint was filed more than four years ago, filing of application by the plaintiffs after sufficient lapse of time cannot be allowed. It was also recorded that the plaintiffs are not having any hope of winning the suit and hence, they thought of filing the present application and accordingly, dismissed the said application. Aggrieved by the same, the present revision petition is preferred.

6. Sri K.G. Krishna Murthy learned counsel representing the revision petitioners would contend that when an application of this nature had been moved, instead of considering the application in the light of the language employed in Order XXIII Rule 1 of the Code, the learned Judge recorded certain extraneous reasons touching the merits of the matter and ultimately refused permission to withdraw the suit with a liberty to file fresh suit. The learned counsel also would submit that the trial was not commenced and no prejudice would be caused even if such a liberty is given by permitting the withdrawal of the suit. Reliance also placed on two decisions of this Court in Vizag Medical Stores v. Bharat Heavy Plate & Vessels Ltd. (A.P.) 2002 (1) A.W.R. 350 (A.P.) and Jajala Narayana Reddy Vs. K. Mohan Reddy and Another, .

7. Heard both the counsel.

8. Order XXIII Rule 1 reads 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 4 of Order XXXIII 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 with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. (4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

9. Order XXIII Rule 1(3) specifies where the Court is satisfied,-

(c) that a suit must fail by reason of some formal defect, or

(d) 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 with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

10. The words, "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 a liberty to institute a fresh suit" would assume some importance. It is clear that it is within the discretion of the Court either to permit the withdrawal or to refuse the withdrawal. It is no doubt true that having permitted to withdraw, refusal of liberty to institute another suit may not be justified.

11. In *Vizag Medical Stores v. Bharat Heavy Plate & Vessels Ltd.* (A.P.) case (1 *supra*), while dealing with the said question after considering the relevant decisions on the point I held at paragraph-9 as under:

"The learned counsel for the respondent had strenuously contended that inasmuch as the registration of a firm is not a formal defect or it does not even fall under the expression "sufficient grounds". The provisions of Order 23 Rule 1(3)(a) and (b) of the CPC are not attracted at all in this matter. The learned counsel for the respondent had also brought to my notice a decision reported in Delhi Development Authority Vs. Kochhar Construction Work and Another, to the effect that initial defect of bar of institution of the suit by or on behalf of the unregistered firm cannot be cured by a subsequent registration of the firm. Even if the contentions of the learned counsel for the respondent are accepted, then the impugned order in toto will be unsustainable and the consequence will be that the parties will be relegated to the original position as on the date of passing of the impugned order. The Court below in all fairness could have dismissed the application in toto and permitted the revision petitioners-plaintiffs to further proceed with the suit to be decided on merits. Instead the Court below had adopted a method of allowing the application in part and dismissing the application in part. In *Marudhachala Nadar v. Chinna Muthu Nadar and Anr.* (AIR 1932 Mad. 155) it was held that the application under Order 23 Rule 1(2) of the Code of Civil Procedure, 1908, must be treated as indivisible. In C.R.P. No. 691/69 by an order dt. 25-2-1970 it was held that the Court has no jurisdiction to dissect the application of this nature into two separate individual portions and grant permission to withdraw and refuse permission to file a suit afresh. In the light of the foregoing discussion, since I am of the considered opinion that even allowing the application in part by the Court below is not sustainable, I am inclined to set aside the impugned order in toto by directing the Court below to consider the suit by permitting the parties to adduce necessary evidence and decide the suit on merits. Accordingly, the impugned order dated 26-7-1999 made in I.A. No. 9/99 in O.S. No. 506/91 on the file, of the Principal Senior Civil Judge, Visakhapatnam, is hereby set aside in toto and consequently the application seeking permission to withdraw itself is dismissed and hence the consequence will be that the suit in O.S. No. 506/91 on the file of the Principle Senior Civil Judge, Visakhapatnam shall have to be proceeded with further in accordance with law. Accordingly, the C.R.P. is allowed to the extent indicated above with the directions specified supra."

12. In *Jajala Narayana Reddy v. K. Mohan Reddy and Anr.* case {2 supra}, the learned Judge at paragraphs 8 and 9 observed as under:

Reverting to the facts of the case, it is evident that the suit in question is still at the stage of trial. The purport of the precedents referred to above, is that as long as a decree is not passed in a suit, the right of a plaintiff to withdraw the suit is almost unfettered. If the plaintiff has secured any benefit in the form of interim orders, before withdrawing the suit, the Trial Court can take the same into account and pass appropriate orders. So far as reserving the liberty of the plaintiff is concerned, it is with reference to the subject-matter and not cause of action. This assumes significance in the suits for perpetual injunction. The reason is that the cause of action in a suit for preventive remedy does not survive once

the suit is withdrawn. It shall always be open to the plaintiff in such suits, to file fresh suit on the basis of subsequent cause of action. The very fact that the plaintiff has chosen to withdraw the suit for injunction discloses that there did not exist any valid cause of action pleaded by him in it while filing. A cause of action, which did not either exist or survive in an earlier suit, cannot constitute the basis for the subsequent suit.

It is in this background that the three directions issued by the Trial Court viz., direction to the respondents to remove the wall, award of costs and rejection of liberty to the plaintiff to file fresh suit on the same cause of action, need to be considered. The direction to the respondents to remove the wall is almost meaningless. It is not known whether the Trial Court intended to issue such direction to the petitioners or the respondents herein. Either way, it is outside the scope of the application filed under Order XXIII, Rule 1 C.P.C. The suit was for injunction simpliciter. With the injunction granted in favour of the petitioner gets dissolved and he will no longer be entitled to protect such temporary injunction. The parties have to work out their remedies as per their entitlement."

13. In the present case, the learned Judge no doubt recorded certain reasons but recording reasons should be recording justifiable reasons. The very fact that some relative had filed yet another suit by itself cannot be a sustainable reason. It is specifically stated that the present counsel while preparing the affidavit in relation to the examination of the witnesses advised that even if substantial amendments are to be introduced, it may not be possible to rectify the defects in the prior pleadings. Hence, this reason may fall under sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of the suit or part of the claim.

14. The expression "sufficient grounds" may have to be considered liberally depending upon the facts and circumstances of a given case. In the light of the reasons which had been stated in the affidavit filed in support of the application and also in view of the change of counsel and advice given by him, and further taking into consideration that the suit is yet to be commenced, the learned Judge could have allowed the application instead of dismissing the same. The result of the dismissal of the application is that the plaintiffs may have to be proceeded with the suit further. Instead, in view of the peculiar facts and circumstances when specific ground had been taken relating to the defective pleading and defective reliefs prayed for, this Court is of the considered opinion that it would be just and proper to permit the revision petitioners to withdraw the present suit with a liberty to institute a fresh suit, if so advised in relation to the subject-matter of the suit or to the part of the claim of the said suit.

15. Accordingly, the Civil Revision Petition is hereby allowed. No costs.