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**(1991) 07 OHC CK 0004**

**In the Orissa High Court**

**Case No : Civil Revision No. 405 of 1990**

Satyendra Shyam Nag

APPELLANT

Vs

Bankim Chandra Pradhan and Others

RESPONDENT

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**Date of Decision : 10-07-1991**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9, Order 23 Rule 1(2)

**Citation : (1991) 2 OLR 305**

**Hon'ble Judges : A. Pasayat, J**

**Bench : Single Bench**

**Advocate : Y.S.N. Murty, P. Mishra and M.K. Mohanty, for the Appellant; None, for the Respondent**

**Final Decision : Allowed**

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## **Judgement**

A. Pasayat, J.—Petitioner who is defendant No. 1 assails correctness of the order passed by learned Subordinate Judge, Balasore permitting the plaintiff (opp. party No. 1) to withdraw a suit with liberty to bring a fresh suit. The motion was objected to by the petitioner on the ground that such liberty ought not to be granted in the circumstances of the case. It was specifically brought to the notice of Court that the suit had already been dismissed against defendant Nos. 2 and 3 for non-compliance of orders passed by the Court. It was also indicated that the application filed for setting aside the order so far as these defendants are concerned having been rejected by Court, the suit was bound to fail and this was not a case of formal defect. The Court, therefore, had jurisdiction to grant requisite permission in terms of Order 23, Rule 1, Sub-rule (2) of the Code of Civil Procedure, 1908 (in short the "Code"). Learned Subordinate Judge held that the suit was bound to fail unless defendant Nos 2 and 3 were brought on record and the same constituted a formal defect and, therefore, prayer for withdrawal of the suit with liberty to file a fresh suit was entertainable.

2. In spite of notice, opposite parties have not entered appearance.

3. The main plank of petitioner's arguments is that non-joinder of a party is not a formal defect since it goes to the root of maintainability of the suit. It is also submitted that sanctity of Court's order refusing to set aside the order of dismissal against defendant Nos. 2 and 3 would be violated, if permission is given to file a fresh suit.

4. The only point for resolution is whether the permission granted to withdraw suit with liberty to file fresh suit was rightly accorded.

5. The suit was bound to fail as observed by learned Subordinate Judge in the absence of defendants 2 and 3. That being the position, to fill up lacunae it was not permissible for the Court to permit filing of a fresh suit. They were necessary parties to the suit. In their absence, there could not have been any effective adjudication of suit. As a camouflage it was not open to the plaintiff to withdraw the suit and institute a fresh one. That would be a mockery of interest of justice.

6. The expression "formal defect" occurring in Clause (a) of Sub- rule (2) of Rule 1 of Order 23 connotes every kind of defect which does not affect merits of the case. Where the ground of withdrawal is a defect of substance, as distinguished from a defect of form, the suit should not be allowed to be withdrawn.

7. A formal defect is a defect of form which is prescribed by rules of procedure such as misjoinder of parties or" cause of action, failure to disclose cause of action. (See *Lingaraj Panda v. Sebati Dibya* : 1972 (I) CWR 643 Non-impletion of necessary parties is not a formal defect. After dismissal of suit against defendant Nos. 2 and 3, the position was as if no suit was instituted against them, and the suit would have failed on account of their absence from the arena of dispute. Omission to substitute heirs was held not to be a case of formal defect. AIR 1972 Gau 85 : *Chandra Saikta v. Rajani Bala*).

8. In this connection Order 1, Rule 9 is relevant. A proviso was inserted in the said Rule by CPC (Amendment) Act, 1976. It provides that the general rule relating to misjoinder or non joinder of parties does not apply to non-joinder of a necessary party. Order 1, Rule 9 is a rule of procedure. Although under Order 1, Rule 9, no suit shall be defeated by reason of misjoinder or non-joinder of parties, still then if the parties who are not only proper but also necessary parties to it, the infirmity in the suit is fatal. Where decree cannot be effective without absent parties, the suit is liable to be dismissed notwithstanding Order 1, Rule 9 being procedural in nature. (See *Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar* ). A distinction has been drawn between non-joinder of a person who ought to have been joined as a party and non-joinder of a person whose joinder is a matter of convenience of expediency (See Order 1, Rule 10(2)).

9. These aspects were not considered by learned Subordinate Judge and his conclusions are indefensible. The impugned order is set aside.

Civil Revision is allowed. No costs.