

(2010) 08 DEL CK 0368

In the Delhi High Court

Case No : CM (M) No. 956 of 2010 and CM No. 13211 of 2010

Smt. Birmati

APPELLANT

Vs

Sh. Iqbal Singh

RESPONDENT

Date of Decision : 03-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(1), Order 32 Rule 1, Order 32 Rule 10, Order 32 Rule 11
Constitution of India, 1950 — Article 226, 227

Citation : (2011) 163 PLR 43

Hon'ble Judges : Vidya Bhushan Gupta, J

Bench : Single Bench

Advocate : Brijesh Kumar Srivastava, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

V.B. Gupta, J.—Petitioner has filed the present petition under Article 227 read with 226 of the Constitution of India, against order dated 29.3.2010 passed by the Additional District judge, Delhi vide which application of respondent under Order 23 Rule 1 of CPC (for short as "Code") seeking permission to withdraw/abandon a part of the claim, was allowed.

2. Brief facts are that, respondent filed suit for Specific Performance of Contract and Permanent Injunction against present petitioner, making following prayer:

a) Pass a decree of specific performance of the agreement to sell dated 08.09.2009 in favour of the plaintiff and against the defendant, whereby directing the defendant to obtain the possession on spot from the DDA and get the conveyance deed executed in her favour and thereafter execute and get registered the sale deed/title documents in respect of the same in favour of the plaintiff and handover the actual physical possession of her share in the suit plot i.e. Plot No. 49, Block-B, measuring 64 sq. mtrs., situated at Rangpuri/Vasant Kunj, New Delhi, as the plaintiff has already paid the entire sale consideration to

the defendant;

b) Pass a decree of permanent injunction in favour of the plaintiff and against the defendant, whereby restraining defendant her attorney/s, servant/s, representative/s, LR/s, family members etc. from selling, alienating, transferring, parting with possession and/or creating any kind of third party interest in any manner in favour of any third person in respect of her share in the suit plot i.e. Plot No. 49, Block-B, Rangpuri/Vasant Kunj, New Delhi;

c) Alternatively, if this Hon"ble Court due to any reason comes to the conclusion that the plaintiff is not entitled for the decree of specific performance as prayed the plaintiff pray for an alternative prayer that this Hon"ble Court may be pleased to pass a decree for recovery of Rs. 12,80,000/- paid as full and final payment to the defendant along with interest @ 18% per annum till the payment is made and pass a decree for recovery of damages in favour of the plaintiff and against the defendant to the tune of Rs. 12,50,000/- whereby directing the defendant to pay a sum of Rs. 12,50,000/- along with interest @ 18% per annum till the payment is made to the plaintiff for the breach committed by the defendant and the loss and damages suffered by the plaintiff.

3. Respondent valued its suit for purposes of jurisdiction and court fees as under:

i) for relief of specific performance and possession at Rs. 12,80,000/-;

ii) for permanent injunction at Rs. 130/-;

iii) for damages at Rs. 12,50,000/- upon the adveloram court fees as already affixed as the same is covered under the sub Clause (i).

4. Petitioner contested the suit amongst others, on the ground that Court has no pecuniary jurisdiction to try the suit as the title value affixed by respondent to the suit for purposes of jurisdiction comes to Rs. 25,30,130/-, which is beyond its jurisdiction.

5. Trial court framed a preliminary issue in this regard that is;

(i) whether this Court does not have the pecuniary jurisdiction to try the suit?

6. When the matter was listed before trial court for arguments on this preliminary issue, respondent moved application under Order 23 Rule 1 of the Code, seeking permission to abandon the relief of damages of Rs. 12,50,000/- from the prayer Clause (c).

7. Trial court, vide impugned order, permitted the respondent to withdraw/ abandon the part of its claim.

8. It is contended by learned Counsel for the petitioner that the Court which does not have pecuniary jurisdiction cannot acquire jurisdiction by the reason of plaintiff (respondent herein) relinquishing a portion of the claim at the later stage, in view of specific bar contained in Section 6 and Order 7 Rule 10 of the Code. The valuation at the time of institution of the suit is the only material fact

and the Court having no jurisdiction is duty bound to return the plaint.

9. It is also contended that, since the suit suffers from inherent lack of jurisdiction, no order except the order for return of the plaint passed by the Court, is of no effect and the same is nullity and void ab initio.

10. In support of its contentions learned Counsel cited a decision of this Court, *Mahesh Gupta Vs. Ranjit Singh and Others*, .

11. Present petition has been filed under Article 227 of the Constitution of India. It is well settled that jurisdiction of this Court under this Article is limited.

12. In *Waryam Singh and Another Vs. Amarnath and Another*, , the court observed;

This power of superintendence conferred by Article 227 is, as pointed out by Harries, C.J., in - *Dalmia Jain Airways Ltd. Vs. Sukumar Mukherjee*, , to be exercised most sparingly and only in appropriate cases in order to keep the Subordinate Courts within the bounds of their authority and not for correcting mere errors.

13. In light of principles laid down in the above decision, it is to be seen as to whether present petition under Article 227 of the Constitution of India against impugned order is maintainable or not.

14. Order 23 Rule 1 of the Code which is relevant for deciding the controversy read 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.

15. Case of *Mahesh Gupta* (supra) is not applicable at all to the facts of the present case since it does not deal with provisions of Order 23 Rule 1 of the Code as respondent has made an alternative prayer in his petition.

16. Supreme Court in *National Agricultural Cooperative Marketing Federation of India Ltd. Vs. Alimenta S.A.*, observed,

where there were two claims arising out of two contracts and claims could easily be segregated or separated, the claimant can give up part of its claim relating to one of the contract.

17. In *Shobha Venkat Rao Vs. K.R. Mahale*, Court observed;

The only purpose of the amendment was to abandon a part of her claim. Order 23, Rule 1(1), Civil P.C. provides that at any time after the institution of a suit,

the plaintiff may abandon a part of his claim. The plaintiff was, therefore, within her right to abandon a part of her claim. This did not require any amendment of the plaint or any permission of the Court. She could have done so voluntarily by a unilateral act of herself. She could have made a statement to the Court and the Court would normally record the statement and proceed to try the suit with regard to the remaining part of the claim.

18. The court further observed;

As long as the Court has not given a finding that it had no jurisdiction and the plaint should be returned for presentation to the proper Court, it is seized of the matter because the Court has the right to decide the question of its own jurisdiction even if the decision ultimately be that it has no jurisdiction. As long as the Court is seized of the matter, it is open to a party at any time to abandon a part of the claim by a unilateral act by making a statement to that effect which the Court must record if thereafter the suit is within its jurisdiction, the Court should proceed to hear it. If this position were not correct, it would only mean that the Court must make an order returning the plaint for presentation to the proper Court and the plaintiff must withdraw the plaint, amend it by abandoning a part of his claim and represent it to the same Court. The only consequence of such procedure would be that the suit must be numbered as a new suit and under the conditions prevailing to-day be heard after another six years and if evidence has already been recorded, as it has been done in this case, the suit must be re-tried. From the words of Order 23, Rule 1(1) I do not think that such consequence is inevitable.

19. Respondent herein, has filed suit for Specific Performance of Contract and for Permanent Injunction. As per prayer Clause (c), an alternative prayer has been made that if the Court due to any reason comes to the conclusion that respondent is not entitled for the decree of specific performance then, decree for recovery may be passed.

20. Since respondent has made an alternative prayer also, thus he is well within his rights to withdraw or abandon the alternative relief sought by him.

21. There is no illegality, ambiguity or irrationality in the impugned order. Present petition having no legal force and is meritless, thus not maintainable under Articles 226 and 227 of the Constitution of India. Same is hereby dismissed with costs of Rs. 10,000/-.

22. Petitioner is directed to deposit the costs with Registrar General of this Court by way of cross cheque, within four weeks from today.

23. Copy of this order be sent to the trial court.

24. List for compliance on 6th September, 2010.

CM No. 13211/2010 (stay)

25. Dismissed.