

(2008) 11 CHH CK 0002
In the Chhattisgarh High Court

Smt. Sandhya Devi and Others

APPELLANT

Vs

Sanjeev Kumar Gupta @ Chunnu and Others

RESPONDENT

Date of Decision : 06-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11, 115

Citation : (2009) 1 MPHT 64

Hon'ble Judges : D.R. Deshmukh, J

Bench : Division Bench

Final Decision : Allowed

Judgement

D.R. Deshmukh, J.—Invoking the civil revisional jurisdiction u/s 115 of the CPC (henceforth "the Code") the applicants/plaintiffs have assailed the order dated 24-3-2008 passed by the District Judge, Ambikapur in Civil Suit No. 9-A/2003, whereby the application of the applicants/plaintiffs under Order 23 Rule 1 (3) of the Code dated 12-3-2008 seeking withdrawal of the suit with liberty to institute a fresh suit was dismissed.

2. It is not disputed that in Civil Suit No. 9-A/2003 evidence of the parties has not begun.

3. Brief facts are that the applicants/plaintiffs had instituted the aforesaid suit on 12-11-2003 against the non-applicants/defendants for permanent injunction restraining them from raising any construction of Saw Mill over the suit land. After the death of the plaintiff Laxmi Chand Gupta, the applicants, who are the legal representatives of the deceased Laxmi Chand Gupta, were substituted. The suit was founded on the averments that Laxmi Chand Gupta is the adopted son of Late Motilal Gupta and on the basis of a registered Will dated 20-6-1970 executed by Motilal Gupta is the sole title-holder of the suit land, i.e., plot No. 1053/1 area 2.19 acres situated in Deviganj Road, Vijay Marg, Kedarpur, Ambikapur. It was pleaded that on 11-11-2003, the defendants had, with an intent to establish a Saw Mill started digging the plinth on the suit land in the

portion marked with green in the map annexed to the plaint. In view of this unauthorised the illegal act of the defendants, a permanent injunction restraining the defendants from doing so was prayed for.

4. The defendants denying the averments of the plaintiff in toto resisted the claim of the plaintiffs on the averment that the Saw Mill of the applicants/ plaintiffs was established on the suit land in the year 1948. Father of the non-applicants Late Kashichand Gupta and Late Satyanarayan Gupta had title to the suit land by birth. It was further pleaded that in an earlier suit Civil Suit No. 2-A/98 the plaintiff had admitted that he neither had title nor possession over the suit land. It was specifically denied that on 11-11-2003 the defendants had started digging work on the suit land to establish a Saw Mill.

5. During the pendency of Civil Suit No. 9-A/2003, an application for amendment under Order 6 Rule 17 of the Code filed by the plaintiff for incorporating the relief of mandatory injunction in the plaint against the defendants to restore the suit land to its original position by removing the Saw Mill. This application was rejected by the learned District Judge on 10-10-2007 by order (Annexure P-7).

6. On 12-3-2008 an application under Order 23 Rule 1 (3) of the Code was filed by the plaintiffs, wherein it was stated as under:

?3? ;g fd oknhx.k ds }kjk] izfroknhx.k dks oknHkwfe dks okn izLrqfr fnukad dh fLFkfr esa ykus gsrq vkKkid fu"ks/kkKk vkns"k iznku djus ckor~ vkosnu Hkh ekuuh; U;k;ky; ds }kjk fujLr dj fn;k x;k gSA

?4? ;g fd okn ds yEcudky esa izfroknhx.k ds }kjk cyiwoZd oknHkwfe dk dCtk ysdj ml ij vkjk e"khuh dk lapkyu djus ls oknHkwfe ,oa okn ds Lo:i esa ifjorZu gks x;k gS] ftlls okn esa izk:fid =qfV;ka mRiUu gks x;h gS

?5? ;g fd mijksDr =qfV;ka ds dkj.k oknhx.k dk okn foQy gksus dh iw.kZ laHkkouk gS] bl dkj.k oknhx.k leku okn fo"k; (subject matter of instituted suit) ij uohu okn iqu% izLqr djus dh NwV ds lkFk viuk okn okil ysuk pkgrs gS] ftl gsrq mUgs vuqefr iznku djuk U;k;ksfpr gS] vU;Fkk oknhx.k dks viw.khZ; {kfr gksxh

vr% ekuuh; U;k;ky; ls fuosnu gS fd] oknhx.k dks leku okn dkj.k (subject matter of instituted suit) ij uohu okn izLqr djus dh NwV ds lkFk yafr O;ogkj okn dz-9&,@03 okil fy;s tkus dh vuqefr iznku djus dh d`ik djsa

An affidavit was also filed by the applicant No. 4, Shankar Lal in support of the application. In Paragraphs 7 and 8 of the affidavit, it was stated as under:

?7? eS "kiFkiwoZd dFku djrk gwa izfroknhx.k ds }kjk oknHkwfe o mlds vklikl dh vU; Hkwfe ,oa ?[k-iz- 1053@2? ij oknds yEcudky esa dCtk dj fy;s tkus ls oknhx.k ,oa [k-u- 1053@2 ds Lokeh jkefuokl xqIrk la;qDr :i ls mDr leLr Hkwfe;ksa ds dCtk izkfIr gsrq izfroknhx.k ds fo:) okn izLqr djuk pkgrs gSA bl izdkj ls u;s okn esa oknHkwfe o i{kdkj nksuks gh ifjofrZr gks tk;sxs A ftlls bl okn esa la"ks/ku ds ek/;e ls lekfo"V djuk laHko ugh gSA

?8? eS "kiFkiwoZd dFku djrk gwa fd mDr fLFkfr esa orZeku yafr okn dks okil

ysdj leku okn dkj.k ij oknHkwfe ds rFkk mDr Hkwfe;ksa ds laca/k esa rFkk okn izLrqr djus dh vuqefr iznku djus ls oknHkwfe dk o mlds yxh vu; Hkwfe;ksa dk izfroknhx.k ls dCtk ysus gsrq ,d gh okn esa lFk&lFk fujkdj.k gks tk,xk] ftlls okn dh ckgqY;rk ugh gksxh] rFkk izfroknhx.k dks Hkh {kfr ugh gksxhA

g- "kiFkxzfgRk "kadj yky xqIrk

7. The application was resisted by the non-applicants on the ground that the essential conditions required for grant of permission for withdrawing from the suit under Order 23 Rule 1(3) of the Code were not satisfied. It was stated in Paragraph 5 as under:

5- ;g fd vkosnui= dh dafMdk 5 esa of.kZr rF; fd oknhx.k dk okn izk:fir =qfVxzLr gks x;k gS] IR; u gksus ds dkj.k badkj gS] O;-iz- lafgrk ds vkns"K 23 fu;e 1 esa "kCn izk:fir =qfV dks Hkys Hkh ifjHkkf"kr ugh fd;k x;k gS] ijUrq fofHkUu U;kf;d n`"Vkar esa izk:fir =qfV dh tks O;k[k; dh xbZ gS] ml rjg dh dksbZ izk:fid =qfV oknhx.k ds O;ogkj okn esa ugh gS] bruk gh ugh ;fn okLro esa oknhx.k ds okn i= esa dksbZ izk:fid =qfV gksrh rks oknhx.k ,slh izk:fid =qfV dk mYys[k vius vkosnu esa vo"; djrsA

It was reiterated that the Saw Mill of the defendants was established on the suit land since 1947-48. In Paragraph 4 of the reply, it was stated as under:

4- ;g fd vkosnui= dh dafM+dk 4 esa of.kZr rF; fd izfroknhx.k ekuuh; U;k;ky; ds le{k bl nokk ds vk;kstu ds mijUr cyiwoZd dCtk ysdj fdlh uohu vkjk fey dh LFkkiuk fd, gS] IR; u gksus ds dkj.k badkj gS] bl lECU/k esa izfroknhx.k dk Li"V fou; gS fd izfroknhx.k nl ekuuh; U;k;ky; }kjk tSlS gh bl ckr dh lwpuK izkIr fd;s fnukad 17&11&03 dks gh bl ekuuh; U;k;ky; dks fof/kor lwpuK ns fn, fd muds }kjk dksbZ uohu vkjk fey dh LFkkiuk ugh dh tk jgh gS] cfYd og 1947&48 ls gh LFkfkir gS] dh iqf"V ou ifj{ks=kf/kdkjh} vfEcDKiqj }kjk fo-O;-ok- dz- 55@03 eas izLrqr izfrosnu esa Hkh dh xbZ gSA

8. The learned District Judge dismissed the application under Order 23 Rule 1 (3) of the Code filed by the plaintiffs on the ground that neither there was any formal defect in the suit nor any justification for withdrawal of the suit. It was further mentioned that the suit was pending since 2003. On 10-10-2007, while rejecting the application under Order 6 Rule 17 of the Code filed by the plaintiffs, the Court had observed that by the amendment sought it was clear that the defendants were in possession of the suit land since 8-12-2003 and, therefore, it was necessary for the plaintiffs to seek the relief of possession after removal of the Saw Mill as a consequential relief. In this view of the matter, the learned District Judge rejected the application while observing that the plaintiffs were at liberty to file an application for amendment seeking the relief of possession of the suit land. On this premise, the learned District Judge dismissed the application.

9. Assailing the impugned order, it was argued by Shri Sanjay K. Agrawal, learned Counsel for the applicants/plaintiffs that the learned District Judge erred

in law in refusing to grant leave to withdraw the suit on the grounds as aforesaid. It was submitted that order of rejection clearly demonstrates failure to exercise the jurisdiction vested in the Court below and warrants interference by this Court in exercise of revisional jurisdiction. Reliance was placed on E.M. Mani v. Tata Tea Ltd., Munnar and Ors. AIR 2006 (Ker.) 757 , Brajamohan Sabato Vs. Sarojini Panigrahi and Another, and Damyanti Rani Bakshi Vs. Maharaj Kumar Mehta, .

10. On the other hand, Shri Prakash Gupta, learned Counsel for the non-applicants/defendants has argued in support of the impugned order. Reliance was placed on K.S. Bhoopathy and Others Vs. Kokila and Others, ,Uma Devi and Anr. v. Nagarpalika, Begamgunj and Ors. 1999 (2) MPJR 487 , Vinod Kumar Gupta Vs. Smt. Ramadevi Shivhare and Another, and Durga Prasad and Others Vs. Laxminarayan deceased through L.Rs., .

11. Order XXIII Rule 1 of the Code makes provisions for withdrawal of suit or abandonment of part of claim. Relevant portions of the provision are extracted hereunder:

ORDER XXIII WITHDRAWAL AND ADJUSTMENT OF SUITS

1. (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.

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(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 the 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.

12. In the case of K.S. Bhoopathy and Ors. v. Kokila and Ors. (supra), the

Supreme Court has succinctly dealt with the law as to withdrawal of suits as under:

12. The law as to withdrawal of suits as enacted in the present Rule may be generally stated in two parts:

(a) a plaintiff can abandon a suit or abandon a part of his claim as a matter of right without the permission of the Court; in that case he will be precluded from suing again on the same cause of action. Neither can the plaintiff abandon a suit or a part of the suit reserving to himself a right to bring a fresh suit, nor can the defendant insist that the plaintiff must be compelled to proceed with the suit; and

(b) a plaintiff may, in the circumstances mentioned in Sub-rule (3), be permitted by the Court to withdraw from a suit with liberty to sue afresh on the same cause of action. Such liberty being granted by the Court enables the plaintiff to avoid the bar in Order II Rule 2 and Section 11, CPC.

13. The provision in Order XXIII Rule 1, CPC 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 a 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; first 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. This becomes all the more important in a case where the application under Order XXIII Rule 1 is filed by the plaintiff at the stage of appeal. Grant of leave in such a case would result in the unsuccessful plaintiff to avoid the decree or decrees against him and seek a fresh adjudication of the controversy on a clean slate. It may also result in the contesting defendant losing the advantage of adjudication of the dispute by the Court or Courts below. Grant of permission for withdrawal of a suit with leave to file a fresh suit may also result in annulment of a right vested in the defendant or even a third party. The Appellate/Second Appellate Court should apply its mind to the case with a view to ensure strict compliance with the conditions prescribed in Order XXIII Rule 1 (3), CPC for exercise of the discretionary power in permitting the

withdrawal of the suit with leave to file a fresh suit on the same cause of action. Yet another reason in support of this view is that withdrawal of a suit at the Appellate/Second Appellate stage results in wastage of public time of Courts which is of considerable importance in the present time in view of large accumulation of cases in Lower Courts and inordinate delay in disposal of the cases.

13. The question for consideration in the present case is whether the learned District Judge exercised the jurisdiction vested under Order 23 Rule 1 (3) of the Code after consideration of matters relevant for exercise of such power.

14. Initially in the suit which was filed on 12-11-2003, the applicants/plaintiffs had claimed only the relief of permanent injunction for restraining the respondents/defendants from interfering with their peaceful possession over the suit land. Subsequently, on 14-8-2007, an application under Order 6 Rule 17, CPC was filed by the applicants/plaintiffs seeking relief for issuance of a mandatory injunction against the respondents/defendants to restore status quo ante in relation to the suit land as it existed on the date of suit on the ground that despite an order of status quo having been passed by the Court on 13-11-2003, the respondents/defendants had, on 8-12-2003, by violating the order, established and started to run a new Saw Mill on the suit land. This application was rejected by the learned District Judge vide order dated 10-10-2007 on the ground that since the respondents had taken over the possession of the suit land on 8-12-2003, it was absolutely necessary for the plaintiffs to seek relief of possession.

15. The learned District Judge erred in doing so because the applicants/plaintiffs had averred that despite an order of status quo passed by the Court on 13-11-2003, the defendants had established a new Saw Mill on the suit land on 8-12-2003. It was therefore wholly unnecessary for the applicants/plaintiffs to seek relief of possession and the relief of mandatory injunction against the respondents/defendants to restore status quo ante, i.e., as on the date of suit had rightly been sought. Instead of challenging the said order, the plaintiffs preferred to file an application under Order 23 Rule 1 (3) of the Code for withdrawal of Suit.

16. The learned District Judge again observed in the impugned order dated 24-3-2008 as under:

4- ;g fd vkosnui= dh dafM+dk 4 esa of.kZr rF; fd izfroknhx.k ekuuh; U;k;ky; ds le{k bl nkok ds vk;kstu ds mijkUr cyiwoZd dCtk ysdj fdlh uohu vkjk fey dh LFkkiuk fd, gS] IR; u gksus ds dkj.k badkj gS] bl lECU/k esa izfroknhx.k dk Li"V fou; gS fd izfroknhx.k nl ekuuh; U;k;ky; }kjk tSlS gh bl ckr dh lwpuK izkIr fd;s fnukad 17&11&03 dks gh bl ekuuh; U;k;ky; dks fof/kor lwpuK ns fn, fd muds }kjk dksbZ uohu vkjk fey dh LFkkiuk ugh dh tk jgh gS] cfYd og 1947&48 ls gh LFkkfir gS] dh iqf"V ou ifj{ks=kf/kdkjh} vfEcdkiqj }kjk fo-O;-ok- dz- 55@03 eas izLrqR izfrosnu esa Hkh dh xBZ gSA

17. It is thus, clear that under the order dated 10-10- 2007 which had attained finality, the suit would have failed unless the relief of possession was also sought by the plaintiffs, This would fall within the purview of "a formal defect" due to which the suit would have failed as contemplated under Sub-clause (3) (a) of Rule 1 of Order 23 of the CPC. The trial in the suit had not commenced., No prejudice was caused to the respondents/defendants, if permission was granted to the applicants/plaintiffs to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter of the suit. It was, therefore, a fit case in which the learned District Judge ought to have allowed the application under Order 23 Rule 1 (3) of the Code with liberty to the applicants/plaintiffs to institute a fresh suit in respect of the subject-matter of the suit. By rejecting the application under Order 23 Rule 1 (3) of the Code, the learned District Judge had improperly exercised the jurisdiction vested in him under Order 23 Rule 1 (3) of the Code.

18. In the result, the civil revision is allowed. The impugned order dated 24-3-2008 passed by the District Judge, Raipur in Civil Suit No. 9-A/2003 is set aside. The applicants/plaintiffs are permitted to withdraw the suit with liberty to institute a fresh suit in respect of the subject-matter of the suit.