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V. RAJENDRAN AND ANR.

v.

ANNASAMY PANDIAN (D) THR. LRS. KARTHYAYANI
NATCHIAR

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(Civil Appeal No. 861 of 2017)

JANUARY 24, 2017

[DIPAK MISRA AND R. BANUMATHI, JJ.]

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Code of Civil Procedure, 1908 – O. XXIII, r.1(3)(a) – Withdrawal of suit – On ground of “formal defect” in suit – Appellants filed suit for permanent injunction describing suit property with a defective survey number – Thereafter, during trial, appellant filed application u/O. XXIII, r.1(3) for withdrawal of the suit – Propriety of – Held: Defect in the survey number of the suit property goes to the very core of the subject matter of the suit and entire proceedings would be fruitless if the decree holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a ‘formal defect’ within the meaning of O.XXIII, r.1(3), CPC – Hence, case of appellant would fall u/O.XXIII, r.1(3)(a).

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Costs – Enhancement of – Appellants filed suit for permanent injunction in 2004 – After ten years, an application was filed by appellants u/O.XXIII, r.1(3), CPC seeking withdrawal of the suit – Held: Application was filed after substantial progress was made in the suit – In such circumstances, in instant case, while permitting appellant to withdraw the suit, costs of Rs.3000/- awarded by the trial court enhanced to Rs.10,000/-.

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Allowing the appeal, the Court

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HELD: 1. Order XXIII Rule 1(3) CPC lays down grounds on which a Court may allow withdrawal of suit. As per Order XXIII Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave.

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The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a “formal defect” or “sufficient grounds”. The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action. [Para 9] [513-D-H; 514-A]

2. When an application is filed under Order XXIII Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties. [Para 10] [514-C-E]

3. In terms of Order XXIII Rule 1(3) (b) CPC where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word “sufficient grounds”, there are two views: One view is that these grounds in clause (b) must be “*ejusdem generis*” with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words “other sufficient grounds” in clause(b) should be read independent of the words a ‘formal defect’ and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). [Para 11] [514-F-G]

4. In the present case, the appellants have filed the suit describing the suit property as Survey No.192/9 but the respondents are said to have transferred the *patta* for the suit property settling as Survey No.192/14. The defect in the survey number of the suit property goes to the very core of the subject matter of the suit and the entire proceedings would be fruitless if the decree holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a

A “formal defect” within the meaning of Order XXIII Rule 1(3)(a) CPC. That apart the respondents are said to have executed an Inam Settlement Deed, in favour of their son, mentioning the suit property as Survey No.192/14. The case of the appellants would fall under clause (a) of Rule 1(3) CPC. [Para 12] [515-A-C]

B 5. In the facts and circumstance of the case, the trial court considered the allegation set out in the application as a ground for withdrawal. The view taken by the trial court that the suit suffered from a formal defect to allow the appellants to withdraw the suit with permission to institute a fresh suit, is correct. The High Court was not right in interfering with the discretion exercised by the trial court, permitting the appellants to withdraw the suit with liberty to file a fresh suit. Based on the order passed by the trial court, the appellants have already filed suit before District Munsif. The High Court while passing the order does not seem to have kept in view the said suit filed by the appellants.

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D In the facts and circumstance of the case, the impugned order passed by the High Court cannot be sustained. [Para 13] [515-D-E]

E 6. The appellants have filed the suit way back in 2004 after the witnesses on either side were examined and the application was filed under Order XXIII Rule 1 (3) CPC seeking withdrawal of the suit in the year 2014, after substantial progress was made in the suit. In such circumstances, costs of Rs.3000/- awarded by the District Munsif is to be enhanced. [Para 14] [515-F]

F *K.S. Bhoopathy and Ors. v. Kokila and Ors.* (2000) 5 SCC 458: [2000] 3 SCR 1168 – referred to.

Case Law Reference

[2000] 3 SCR 1168

referred to

Para 10

G CIVIL APPELLATE JURISDICTION: Civil Appeal No. 861 of 2017.

From the Judgment and Order dated 09.03.2015 of the High Court of Madurai Bench of Madras High Court in C.R.P. PD (MD) No. 248 of 2015.

H S. Nanda Kumar, Parivesh Singh, P. Srinivasan, Ram Dhan Singh Narwal, Naresh Kumar, Advs. for the Appellants.

The Judgment of the Court was delivered by A

R. BANUMATHI, J. 1. Leave granted.

2. This appeal arises out of the impugned order dated 09.03.2015 passed by the High Court of Madras at Madurai Bench allowing C.R.P. NPD (MD) No. 248 of 2015, thereby declining the leave to the appellants to withdraw the suit. B

3. Case of appellants-plaintiffs is that originally the suit property was the ancestral property of Annasamy Pandian, who is the father of the respondent-Karthayani Natchiar herein and the *patta* for the entire suit property was issued in the name of Annasamy Pandian and his relatives (Pangaligal). The said Annasamy Pandian appointed one Thangaraj as his power agent to deal with his property by a registered Power of Attorney Deed dated 09.09.1999. Based upon the said Power of Attorney, the appellants purchased the said suit property from Thangaraj under four sale deeds i.e. 50 cents each. The appellants being husband and wife, fenced the suit property purchased by them and possessed and enjoyed the same as a single property. The Tahsildar of Kadaladi has passed an order dated 31.03.2003, confirming the appellants' purchase and possession over the suit property. Further case of the appellants is that on the application of the respondent's husband, the Sub-Collector, Paramakudi without conducting proper enquiry, cancelled the *patta* in the name of the appellants and transferred the *patta* in the name of the father of the respondent-Karthayani Natchiar by order dated 06.08.2003. Alleging that the respondents are trying to interfere with the possession of the appellants of the suit property, the appellants have filed the suit as O.S. No.89 of 2004 for permanent injunction. In the said suit, the respondents filed written submission contending that the Power of Attorney was fraudulently obtained by said Thangaraj as he has no right to sell the suit property to the appellants. C
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4. According to the appellants, after the written statement was filed and during the trial, they learnt that the respondents while transferring the *patta* in respect of the suit property (Survey No.192/9), they have transferred it as Survey No.192/14, which the appellants were not aware of at the time of filing the suit. During the pendency of the suit, the respondent - Karthyayani Natchiar alongwith her husband-Velladurai is said to have clandestinely executed and registered an Inam Settlement Deed on 21.09.2012 in favour of their son Aranmanai Pandian, mentioning G
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A the Survey No.192/14; and they are also said to have handed over the possession of the suit property to him. Parties have also litigated before the Revenue Court regarding transfer of *patta*.

5. The trial in the suit commenced; witnesses were examined on both the sides. After the suit was posted for judgment, on application
B filed by the appellants for raising additional issues and for examining additional witnesses, the suit stood adjourned. At that stage, the appellants filed the application for withdrawal of the suit in terms of Order XXIII Rule 1 (3) CPC. The District Munsif allowed the application filed by the appellants seeking withdrawal of the suit with liberty to file a fresh suit and directed the appellants to pay cost of Rs.3,000/- to the respondents.
C Being aggrieved, the respondents filed revision before the High Court, which was allowed and order of the trial court was set aside. The High Court held that the appellants have failed to establish either “formal defects” or “sufficient grounds” for withdrawal of the suit. Being aggrieved, the appellants have preferred this appeal by way of special
D leave.

6. The learned counsel appearing for the appellants Mr. Nanda Kumar has submitted that the appellants filed the suit in O.S.No.89 of 2004 seeking relief of permanent injunction in respect of the suit property described as Survey No.192/9, but while transferring the *patta*, in favour
E of the respondents, it was transferred as Survey No.192/14, which the appellants were not aware of at the time of filing of the suit. The appellants have also alleged that only after the suit was filed, they came to know that the respondent and her husband executed a registered Inam Settlement Deed on 21.09.2012 in favour of respondent’s son Aranmanai Pandian mentioning the suit property as Survey No.192/14. Learned
F counsel submitted that because of change in the survey number of the suit property and also the alleged settlement deed in favour of Aranmanai Pandian, a confusion will prevail with regard to the identification of the suit property and hence the appellants had to file an application under Order XXIII Rule 1 (3) CPC and the trial court was right in allowing the
G application filed by the appellants to withdraw the suit with liberty to file a fresh suit. It was submitted that without proper appreciation of the points raised by the appellants, the High Court erred in setting aside the order passed by the trial court.

7. The respondents were served but none appeared for the
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respondents. We have heard learned counsel for the appellants and perused the impugned order and the materials on record. A

8. The High Court *vide* impugned order held that the defect mentioned by the appellants in the application seeking withdrawal of suit, is not a “formal defect” and that the provision of withdrawal of the suit contemplated under Order XXIII Rule 1(3) CPC cannot be allowed to be misused by the parties. The High Court took note of the fact that the appellants participated in the trial of the suit for about a decade and when the suit was listed for framing additional issues and for examining the additional witnesses, the appellants moved abruptly an application seeking withdrawal of the suit on an inapposite ground which could have been easily addressed by way of an application under Order VI Rule 17 CPC for amendment of pleadings and that the appellants failed to establish either a “formal defect” or “sufficient grounds” for withdrawal of the suit. B C

9. Order XXIII Rule 1(3) CPC lays down following grounds on which a Court may allow withdrawal of suit. It reads as under: D

R.1. Withdrawal of suit or abandonment of part of claim.-

(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. E F

As per Order XXIII Rule 1(3) CPC, suit may only be withdrawn with permission to bring a fresh suit when the Court is satisfied that the suit must fail for reason of some formal defect or that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit. The power to allow withdrawal of a suit is discretionary. In the application, the plaintiff must make out a case in terms of Order XXIII Rule 1 (3) (a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order XXIII Rule 1 (3) CPC for withdrawal of the suit with liberty to bring a fresh suit only if the condition in either of the clauses (a) or (b) that is, existence of a “formal defect” or “sufficient grounds”. G H

A The principle under Order XXIII Rule 1 (3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

10. In *K.S. Bhoopathy and Ors. vs. Kokila and Ors.* (2000) 5 SCC 458, it has been held that it is the duty of the Court to be satisfied about the existence of “formal defect” or “sufficient grounds” before granting permission to withdraw the suit with liberty to file a fresh suit under the same cause of action. Though, liberty may lie with the plaintiff in a suit to withdraw the suit at any time after the institution of suit on establishing the “formal defect” or “sufficient grounds”, such right cannot be considered to be so absolute as to permit or encourage abuse of process of Court. The fact that the plaintiff is entitled to abandon or withdraw the suit or part of the claim by itself, is no licence to the plaintiff to claim or to do so to the detriment of legitimate right of the defendant. When an application is filed under Order XXIII Rule 1(3) CPC, the Court must be satisfied about the “formal defect” or “sufficient grounds”. “Formal defect” is a defect of form prescribed by the Rules of procedure such as, want of notice under Section 80 CPC, improper valuation of the suit, insufficient court fee, confusion regarding identification of the suit property, mis-joinder of parties, failure to disclose a cause of action etc. “Formal defect” must be given a liberal meaning which connotes various kinds of defects not affecting the merits of the plea raised by either of the parties.

11. In terms of Order XXIII Rule 1(3) (b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word “sufficient grounds”, there are two views: 6 One view is that these grounds in clause (b) must be “*ejusdem generis*” with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words “other sufficient grounds” in clause(b) should be read independent of the words a ‘formal defect’ and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in the present case, we are only concerned with “formal defect” envisaged under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is “sufficient grounds”.

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12. In the present case, the appellants have filed the suit describing the suit property as Survey No.192/9 but the respondents are said to have transferred the *patta* for the suit property settling as Survey No.192/14. The defect in the survey number of the suit property goes to the very core of the subject matter of the suit and the entire proceedings would be fruitless if the decree holder is not able to get the decree executed successfully and thus, the said defect will constitute to be a “formal defect” within the meaning of Order XXIII Rule 1(3)(a) CPC. That apart the respondents are said to have executed an Inam Settlement Deed on 21.09.2012, in favour of their son Aranmanai Pandian, mentioning the suit property as Survey No.192/14. We are convinced that the case of the appellants would fall under clause (a) of Rule 1(3) CPC. A
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13. In the facts and circumstance of the case, the trial court considered the allegation set out in the application as a ground for withdrawal. The view taken by the trial court that the suit suffered from a formal defect to allow the appellants to withdraw the suit with permission to institute a fresh suit, is correct. The High Court, in our view, was not right in interfering with the discretion exercised by the trial court, permitting the appellants to withdraw the suit with liberty to file a fresh suit. Based on the order passed by the trial court, the appellants have already filed suit before District Munsif and the same is numbered as O.S. No.11/2015. The High Court while passing the order on 09.03.2015 does not seem to have kept in view the said suit filed by the appellants. In the facts and circumstance of the case, the impugned order passed by the High Court cannot be sustained. D
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14. The appellants have filed the suit bearing O.S.No.89 of 2004 way back in 2004 after the witnesses on either side were examined and the application I.A.No.424 of 2014 was filed under Order XXIII Rule 1(3) CPC seeking withdrawal of the suit in the year 2014, after substantial progress was made in the suit. In such circumstances, in our view, costs of Rs.3000/- awarded by the District Munsif is to be enhanced. F

15. We, accordingly, set aside the impugned order of the High Court and restore the order of the trial court with modification to the effect that the cost imposed on the appellants is enhanced from Rs.3,000/- to Rs.10,000/- The appeal is allowed. No costs. G