

within stipulated period, petitioner shall be entitled for interest @ 12% per annum.

(20) Resultantly, all these four writ petitions stand allowed, however, with no order as to costs.

---

*S. Gupta*

***Before Dr. Bharat Bhushan Parsoon, J***

**SMT. KAPILA SHARDA — *Petitioner***

*versus*

**SMT. DHANPATI DEVI AND OTHERS — *Respondents***

**CR No. 5578 of 2013**

November 03, 2014

***Code of Civil Procedure, 1908 — Order XXIII Rule 1(3) — Dismissal of application for permission to withdraw suit with liberty to file afresh on same cause of action — Suit sought to be withdrawn as Plaintiff realized it was inherently flawed and had formal and incurable defects — Perusal of provision reveals that Court can allow such withdrawal with liberty to file afresh if earlier suit likely to fail due to formal defect — Party not to suffer for lapse on part of counsel — Other party can be compensated by costs — Petition allowed and liberty granted to Petitioner to withdraw suit and file afresh on same cause of action.***

*Held*, that when concededly defects in the suit are such which cannot be cured by way of amendment in the pleadings under Order VI Rule 17 CPC and the defects, inter-alia, were technical and formal, there is no other option but to allow withdrawal of the suit with liberty to file a fresh one on the same cause of action.....In any case, the parties do not lose or win on technicalities of law but on the merit and worth of their substantive rights.

(Para 19 and 20)

*Further held*, that perusal of this provision reveals that the Court can allow the plaintiff to withdraw the suit with liberty to file fresh one on the same cause of action when the earlier suit is likely to fail by reason of some formal defect..... Merely because counsel for the petitioner-plaintiff committed some mistake in drafting the pleadings and such defect is not curable by amendment of the same though the mistake can be rectified by allowing the plaintiff to avail the remedy

under Order XXIII Rule 1(3) CPC by filing a fresh suit on the same cause of action to cure the formal defect, there should not be any reason to disallow the same. It is a well established principle of law that a party should not be allowed to suffer for a lapse on the part of his counsel.

(Para 22 & 23)

A.S. Sodhi, Advocate *for the petitioner*.

Gaurav Chopra, Advocate for respondents No.1, 2, 6 and 9.

Respondents Nos.3, 4, 7, 8, 11, 12, 15 to 17, 19, 22 to 25 and 27 already ex-parte.

**DR. BHARAT BHUSHAN PARSOON, J.**

(1) Dismissal of application under Order XXIII Rule 1(3) CPC whereby permission had been sought by the plaintiff to withdraw the suit with liberty to file the same afresh on the same cause of action, forms genesis of this revision petition.

(2) There are 27 respondents impleaded in this petition. Though some of the respondents have been appearing through their counsel while some others had been proceeded against ex-parte but still some were yet to be served because correct addresses of theirs were not forthcoming from the petitioner.

(3) Before the arguments were started, counsel for the petitioner made a statement that for decision of this revision petition, other unserved respondents were not required and thus gave them up for this purpose.

(4) A suit filed by the plaintiff, petitioner herein, is pending adjudication before the Court of Civil Judge (Senior Division), Fazilka (Annexure P-3) where properties located in Fazilka as also in New Delhi are in litigation. When the suit reached the stage of evidence of the plaintiff, it was realised by her that it was inherently flawed and also suffered from a formal defect. Convinced that the suit was bound to fail, her application made to withdraw the same with liberty to file fresh one with better particulars on the same cause of action, was declined by the lower court on 3.9.2013 vide order (Annexure P-1) which is now under challenge in this revision petition.

(5) Counsel for the contesting respondents urged that the petitioner-plaintiff has already sufficiently prolonged and

procrastinated the matter resulting in harassment to the respondents and thus no permission should be granted for filing a fresh suit on the same cause of action.

(6) Hearing has been provided to the counsel for the parties while going through the paper book.

(7) Litigants depend on advice of their lawyer Even well-read persons in the field of law hesitate to take decision on their own without consulting their lawyer Claim of the petitioner-applicant-plaintiff is that on the facts and circumstances disclosed by her, the plaint was drafted by her lawyer and the suit was filed which later on was found to be inherently flawed.

(8) If we go through the impugned order, entire stress of the lower court while dismissing the application of the petitioner-plaintiff is that the application was filed belatedly. Merely because an application for withdrawal of a suit under Order XXIII Rule 1(3) CPC has been filed belatedly, could not be a ground to reject such application if it otherwise was having merit.

(9) In *Govind Gulabrao More and another versus Laxman Sahebrao More and others*<sup>1</sup>, it was held that even Appellate Court has power to grant permission to withdraw the suit with liberty to file fresh suit. Almost in similar tone, a co-ordinate Bench of this Court in *Sant Baba Darshan Singh Sewak Baba Kharak Singh versus School Beerh Baba Budha Sahib and others*<sup>2</sup>, lucidly explained that in case of dismissal of a suit on merits by a lower court, the plaintiff could still withdraw the suit at appellate stage with permission to file fresh suit on the same cause of action. Support in this regard may also be had from the judgments of this Court in *Kanhya Lal (deceased) through Legal Representatives and another versus Nathu and others*<sup>3</sup>, *Vinod Kumar versus Gurmail Singh and another*<sup>4</sup>, and *Amar Singh versus Kashmiri Lal*<sup>5</sup>.

(10) The petitioner-plaintiff had filed a suit for declaration and injunction qua her share as a coparcener in HUF properties located in Fazilka and New Delhi. On having been counselled by another counsel,

---

<sup>1</sup> 2000 (2) CCC 35 (Bombay)

<sup>2</sup> 2006(2) RCR (Civil) 160

<sup>3</sup> 1990(1) RRR 10

<sup>4</sup> 2012(1) CCC 769

<sup>5</sup> 2009(2) CCC 449

she realised that she was not in possession of some of the properties and seeking of relief of possession or joint possession by way of partition, was necessary.

(11) During the pendency of the suit, it was discovered by the petitioner-applicant-plaintiff that respondent No.1 had already sold one of the properties mentioned in the plaint for a sum of ₹5 crores which fact was also necessary to be incorporated in the plaint.

(12) Mahavir Parsad, defendant No.2, who was Karta of the HUF in retaliation had set up a Will dated 10.11.1989 of his father whereby he had claimed inheritance of some of the properties but ancestral property by its very nature could not be bequeathed and thus, it was necessary to seek a declaration that the said Will in question was a nullity and was inconsequential qua the coparcenary HUF property.

(13) It was further discovered that certain properties had been sold during pendency of the suit and some fraudulent acts had been committed by defendant No.1 and others but the same had also not found their place in the plaint because of subsequent events and thus needed to be incorporated to update the factual matrix.

(14) Smt. Dhanpati Devi as per alleged Will dated 10.11.1989 had inherited only 1/4<sup>th</sup> share in the property but she had executed four registered sale deeds four times selling of 1/4<sup>th</sup> share each time to defendant No.2, 6 and 9. This could not have been done and was required to be challenged.

(15) Citing these few instances to demonstrate that the suit was inherently flawed and was having a formal defect, it had been pleaded that the suit is not only technically defective but also suffered from formal and incurable defect which could not be rectified by amendment in the plaint and hence a fresh suit on the same cause of action by withdrawal of the present one, was required to be instituted.

(16) Notwithstanding the fact of strong opposition emerging from the contesting respondents, it remains a fact that the plaintiff who concededly is a widow living at a far off place from Fazilka could not have been in the know of day to day developments qua the lis in dispute and thus apparently was not apprised of the developments taking place qua the property in dispute.

(17) In the application for seeking withdrawal of the suit, it had elaborately been mentioned by her that she had obtained divorce from her husband on 5.1.2009 and has a daughter of six years old whom she

was to support and sustain and thus, by doing a clerical job in a trading company was making both ends meet in Malegaon, District Nasik (Maharashtra).

(18) During the course of arguments, when questioned, counsel for the respondents could not convince the Court except addressing arguments that the suit had already been delayed having been filed in the year 2009 and permission to file, a fresh one should not be allowed.

(19) When concededly defects in the suit are such which cannot be cured by way of amendment in the pleadings under Order VI Rule 17 CPC and the defects, interalia, were technical and formal, there is no other option but to allow withdrawal of the suit with liberty to file a fresh one on the same cause of action.

(20) In any case, the parties do not lose or win on technicalities of law but on the merit and worth of their substantive rights. When the applicant-petitioner-plaintiff has very clearly elaborated that she has not even sought possession of the properties qua which she is out of possession, it is apparent that there is formal defect of crucial nature.

(21) At this stage, It is pertinent to reproduce Order 23 of the CPC, which reads as under:

**“ORDER XXIII**

**Withdrawal and Adjustment of Suits**

**(1) Withdrawal of suit or abandonment of apart 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.

(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 a pleader to the effect that the abandonment proposed is, in his opinion, of 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 or such subject-matter of 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.”

(22) Perusal of this provision reveals that the Court can allow the plaintiff to withdraw the suit with liberty to file fresh one on the same cause of action when the earlier suit is likely to fail by reason of some formal defect. In the case in hand, concededly, the petitioner-plaintiff is not in possession of many of the properties in dispute. She thus, has filed a suit seeking relief of mere declaration sans relief of possession. Clearly, the suit is not maintainable as no declaratory decree can be passed without claiming relief of possession if the same is not with the plaintiff though is legally available to the plaintiff on the date of filing of the suit. Mere negligence on the part of the plaintiff in not claiming relief of possession at the time of initial filing of the suit ipso facto is no ground to castigate the plaintiff or to reject her claim. Rather, the other party can well be compensated by way of costs even if there is negligence on the part of the petitioner-plaintiff in not claiming the relief of possession initially.

(23) Merely because counsel for the petitioner-plaintiff committed some mistake in drafting the pleadings and such defect is not curable

by amendment of the same though the mistake can be rectified by allowing the plaintiff to avail the remedy under Order XXIII Rule 1(3) CPC by filing a fresh suit on the same cause of action to cure the formal defect, there should not be any reason to disallow the same. It is a well established principle of law that a party should not be allowed to suffer for a lapse on the part of his counsel. Support in this regard may be sought from *Om Prakash versus Sarupa and others*<sup>6</sup>, *Muthukaruppan @ Velayutham versus Suresh @ Muthukaruppan*<sup>7</sup>, and *Herbert Irwin Pereira versus Rudolph Pereira and others*<sup>8</sup>.

(24) Keeping in view the totality of facts and circumstances as mentioned earlier, it is a clear case where the learned lower court has committed illegality in declining the request of the petitioner-plaintiff to withdraw the suit with liberty to file fresh one on the same cause of action.

(25) Sequelly, accepting the present revision petition and setting aside the impugned order, the application filed by the petitioner-plaintiff to withdraw the suit with liberty to file fresh one on the same cause of action under Order XXIII Rule 1 CPC is allowed.

(26) However, the petitioner-plaintiff is burdened with costs of ₹20,000/- to be paid to the opposite side which shall be a condition precedent.

---

*M. Jain*

***Before Rameshwar Malik, J***

**M. S. AHLAWAT—Petitioner**

*versus*

**HARYANA URBAN DEVELOPMENT AUTHORITY AND  
OTHERS — Respondents**

**CWP No.19254 of 2004**

December 17, 2014

***Constitution of India, 1950 — Art. 226 — HUDA — Adverse Remark recorded in the ACR of Petitioner — Representation of the petitioner against adverse remarks was rejected by passing non-speaking order — Petitioner was compulsorily retired from service***

---

<sup>6</sup> AIR 1981 Punjab 157

<sup>7</sup> 2000(1) RCR (Civil) 655 (Madras)

<sup>8</sup> 2010(2) BCR 824 (Bombay)