(2013) 11 AP CK 0092

Andhra Pradesh High Court

Case No: CRP. No''s. 4274 and 3033 of 2011

Dr. M. Srinivas Rao		APPELLANT
	Vs	
Madhura Centre/Tiffin and Another		RESPONDENT

Date of Decision: Nov. 12, 2013

Hon'ble Judges: M.S. Ramachandra Rao, J

Bench: Single Bench

Advocate: P. Narsing Rao, for the Appellant; M.V.S. Suresh for Defendant Nos. 1 and 2, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

M.S. Ramachandra Rao, J.

The petitioner in both these revisions filed under Art. 227 of the Constitution of India, is the plaintiff in OS. No. 972 of 2006 on the file of XII Junior Civil Judge, City Civil Court, Hyderabad. As the subject matter of both these revisions are inter-related, they are being disposed of by this common order. The parties will be referred to as per their array in CRP. No. 4274 of 2011. The subject matter of the above suit is a Mulgi No. 17-1-376/352/3, forming part of a House No. 17-1-376/352, Santoshnagar Colony, Hyderabad. The plaintiff contended that he is the absolute owner of the property H. No. 17-1-376/352 having purchased it under a registered sale deed dt. 15.10.1992; that in the eastern side of the said house he constructed three mulgies which were given bye numbers 17-1-376/352/1, 2 and 3; that he let out mulgi No. 17-1-376/352/3 (the suit mulgi) to the 1st respondent/1st defendant to run a medical shop and general stores on a monthly rent of Rs. 2,000/-; that he instructed his close relative, the 2nd respondent/2nd defendant to collect rents from 1st defendant but the latter having collected the rents, did not pay the same to him and swallowed them; that he intends to demolish the entire premises for constructing his own Nursing Home and therefore, the following reliefs be granted

to him:

(i) to grant a decree of declaration declaring the plaintiff to be absolute owner, entitled to recover possession of suit Mulgi No. 17-1-376/352/3 Santoshnagar Colony, in front of Yadagiri theatre, Hyderabad, as shown in the suit schedule;

(ii) directing the Defendant No. 1 to quit/vacate and deliver to Plaintiff vacant possession of the suit schedule portion Malgi bearing No. 17-1-376/352/3, Santoshnagar Colony, (in front of Yadagiri Theatre), Hyderabad.

(iii) directing the defendant No. 1 to pay arrears of rent of Rs. 8,000/- from 01.10.2005 to 31.01.2006 to Plaintiff;

(iv) awarding damages/mesne profits to Plaintiff against Defendant No. 1 at Rs. 5,000/- per month from 01.02.2006 onwards till surrender of possession.

(v) restraining the Defendant No. 2 perpetually from interfering with Plaintiff''s peaceful possession and collecting rent of suit schedule portion of property i.e. Mulgi No. 17-1-376/352/3, Santoshnagar Colony, Hyderabad;

(vi) awarding the cost of the suit to Plaintiff against defendants;

(vii) grant to Plaintiff such other relief or reliefs as this Hon''ble Court may deem fit and proper in the circumstances of the case and in the interest of justice.

2. The 2nd respondent in CRP. No. 4274 of 2011, by name M. Laxmaiah, who is impleaded as 1st respondent in CRP. No. 3033 of 2011 is the 2nd defendant in the above suit. He filed OS. No. 334 of 2004 before X Addl. Chief Judge, Fast Track Court, City Civil Court, Hyderabad to declare that he is the absolute owner and possessor of the property bearing H. No. 17-1-376/352, Santoshnagar, Hyderabad (in which the property H. No. 17-1-376/352/3, Santoshnagar, Hyderabad which is the subject matter of OS. No. 972 of 2006 is located) and for perpetual injunction restraining his brother by name M. Yellaiah, the petitioner herein, the petitioner''s brother Dr. M. Kishan Rao and mother by name Smt. M. Laxmamma from interfering with his peaceful possession and enjoyment of the plaint schedule property and for costs. This suit was dismissed on 28.10.2010. Aggrieved thereby, he filed CCCA. No. 84 of 2011 on the file of this Court and the same is pending.

3. IA. No. 401 of 2011 was filed by M. Laxmaiah, the 2nd defendant in OS. No. 972 of 2006 u/s 10 of CPC to stay all further proceedings in OS. No. 972 of 2006 pending disposal of CCCA. No. 84 of 2011 on the file of the High Court. In the said application he contended that the first relief claimed in OS. No. 972 of 2006 (i.e., the relief to declare the plaintiff therein as the absolute owner of the suit Mulgi) is inextricably connected with CCCA. No. 84 of 2011 wherein he (M. Laxmaiah) has sought relief of declaration of title of the property being H. No. 17-1-376/352, Santoshnagar, Hyderabad (within which the suit mulgi is located); therefore, the matter directly and substantially in issue in CCCA. No. 84 of 2011 is also directly and substantially in

issue in OS. No. 972 of 2006; that since the CCCA. No. 82 of 2011 arose out of OS. No. 334 of 2004, a suit filed prior to OS. No. 972 of 2006, the proceedings in the latter suit need to be stayed in order to avoid multiplicity of litigation and to avoid confusion among the parties during the course of evidence. It was also mentioned therein that during the pendency of OS. No. 334 of 2004, in IA. No. 984 of 2007 filed by him u/S. 10 CPC, the proceedings in OS. No. 972 of 2006 were stayed till the disposal of OS. No. 334 of 2004.

4. After filing of this I.A, the petitioner filed a memo SR. No. 1148 of 2011 in OS. No. 972 of 2006 categorically stating that he abandons/withdraws the first relief sought by him relating to declaration of his title in respect of the suit Mulgi.

5. He also filed a counter in IA. No. 401 of 2011 stating that he had abandoned the first relief in OS No. 972 of 2006 as to declaration of his title to the suit Mulgi, that the said issue need not be tried; and therefore, there is no necessity to stay the proceedings in OS. No. 972 of 2006 u/S. 10 CPC as the nature of the suits OS. No. 972 of 2006 and OS. No. 334 of 2004 are now different.

6. The 2nd defendant filed a counter to the memo filed by the plaintiff stating that the plaintiff is barred from seeking such relief, as sought by him in the Memo, except under Order XXIII CPC.

7. By order dt. 20.06.2011 in Memo SR No. 1148 of 2011, the Trial Court held that by merely filing a Memo, a plaintiff cannot withdraw or abandon part of the relief claimed for by him in the suit; that under the Civil Rules of Practice, for every relief under the provisions mentioned in the CPC, a party has to file an interlocutory application; that the plaintiff herein has not filed such an interlocutory application but has only filed a memo and therefore the memo is not maintainable. The Court also observed that if the plaintiff is permitted to file a memo, no decree or order would be prepared on the memo and the defendant would lose an opportunity to prefer a revision before the higher courts and his right will be defeated. It further observed that there are technical problems in permitting the plaintiff to file the memo and therefore such practice cannot be permitted.

8. Aggrieved by this order, the plaintiff has filed CRP. No. 4274 of 2011.

9. The Trial Court also allowed IA. No. 401 of 2011 by order dt. 23.06.2011 on the ground that the property involved in both the suits OS. No. 972 of 2006 and OS. No. 334 of 2004 is one and the same and the dispute as to ownership of the property is common to both suits; therefore, trial in OS. No. 972 of 2006 cannot go on unless CCCA. No. 84 of 2011 filed against judgment and decree in OS. No. 334 of 2004 is disposed of by the High Court.

10. Aggrieved thereby, CRP. No. 3033 of 2011 is filed by the plaintiff.

11. The counsel for the petitioner/plaintiff Sri P. Narsing Rao, contended that the order dt. 20.06.2011 in Memo Sr. No. 1148 of 2011 in OS. No. 972 of 2006 is

erroneous as there is no necessity for a plaintiff to file an interlocutory application to withdraw a part of the suit claim; a memo stating that the plaintiff withdraws/abandons the relief sought for by him in OS. No. 972 of 2006 as to declaration of title of the suit mulgi is sufficient; that the plaintiff as per law can abandon the suit or part of the claim in the suit as a matter of right without permission of the Court and the Court cannot refuse such permission; once the plaintiff has abandoned the relief of declaration of title with regard to the suit mulgi, the Court cannot say that there is an issue in OS. No. 972 of 2006 as to title which is common to CCCA. No. 84 of 2011; consequently, the order dt. 23.06.2011 in IA. No. 401 of 2011 in OS. No. 972 of 2006 of the Trial Court is also liable to be set aside.

12. The counsel for the respondents on the other hand, supported the decisions of the Trial Court impugned herein. He also relied upon the decisions in National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, and Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor,

13. I have noted the submissions of both sides.

14. In my opinion, the decision in CRP. No. 3033 of 2011 is dependent on the decision in CRP. No. 4274 of 2011. If the order dt. 20.06.2011 passed by the Trial Court in Memo Sr. No. 1148 of 2011 is correct, then automatically the order dt. 23.06.2011 in IA. No. 401 of 2011 would have to be upheld.

15. Therefore, I will first consider whether the plaintiff could have filed a Memo instead of an interlocutory application to withdraw the first relief as to declaration of title regarding the suit mulgi.

16. Order XXIII Rule 1 of CPC states:

R.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.

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

(5) Nothing in this rule shall be deemed to authorise 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.

17. This provision has been considered by various courts including the Supreme Court and has been interpreted as conferring an unfettered right on the plaintiff to withdraw a suit or abandon a part of his claim in the suit unless any right already accrued to the other party in the suit. The only penalty attached to a withdrawal of the suit or part of the claim in the suit is that the plaintiff is precluded from bringing a fresh suit on the same cause of action unless he obtains the leave of the Court for instituting a fresh suit under the provisions of Order 23, Rule 3 Civil P.C.

18. In Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co., , the Supreme Court declared:

The language of order 23 Rule 1 sub-rule (1) CPC, gives an unqualified right to a plaintiff to withdraw from a suit and, if no permission to file a fresh suit is sought under sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under sub-rule (3) of that Rule. There is no provision in the CPC which requires the Court to refuse permission to withdraw the suit in such circumstances and to compel the plaintiff to proceed with it. It is, of course, possible that different considerations may arise where a set-off may have been claimed under order 8 CPC, or a counter claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.

19. In Sneh Gupta Vs. Devi Sarup and Others, , the apex court held:

33. It is also well known that a suit cannot be withdrawn by a party after it acquires a privilege. In R. Ramamurthi Iyer v. Raja V. Rajeswara Rao this Court held:

12. Coming back to the question of withdrawal of a suit in which the provisions of Sections 2 and 3 of the Partition Act have been invoked we find it difficult to accede to the contention of the appellant that the suit can be withdrawn by the plaintiff after he has himself requested for a sale u/s 2 of the Partition Act and the defendant has applied to the court for leave to buy at a valuation the share of the plaintiff u/s 3. In England the position about withdrawal has been stated thus, in the Supreme Court Practice, 1970 at p. 334:

Before judgment.-Leave may be refused to a plaintiff to discontinue the action if the plaintiff is not wholly dominus litis or if the defendant has by the proceedings obtained an advantage of which it does not seem just to deprive him.

As soon as a shareholder applies for leave to buy at a valuation the share of the party asking for a sale u/s 3 of the Partition Act he obtains an advantage in that the court is bound thereafter to order a valuation and after getting the same done to offer to sell the same to such shareholder at the valuation so made. This advantage, which may or may not fulfil the juridical meaning of a right, is nevertheless a privilege or a benefit which the law confers on the shareholder. If the plaintiff is allowed to withdraw the suit after the defendant has gained or acquired the advantage or the privilege of buying the share of the plaintiff in accordance with the provisions of Section 3(1) it would only enable the plaintiff to defeat the purpose of Section 3(1) and also to deprive the defendant of the above option or privilege which he has obtained by the plaintiff initially requesting the court to sell the property u/s 2 instead of partitioning it. Apart from these considerations it would also enable the plaintiff in a partition suit to withdraw that suit and defeat the defendant''s claim which, according to Crump, J., cannot be done even in a suit where the provisions of the Partition Act have not been invoked.

34. Yet again in R. Rathinavel Chettiar v. V. Sivaraman this Court, stated the law, thus:

22. In view of the above discussion, it comes out that where a decree passed by the trial court is challenged in appeal, it would not be open to the plaintiff, at that stage, to withdraw the suit so as to destroy that decree. The rights which have come to be vested in the parties to the suit under the decree cannot be taken away by withdrawal of the suit at that stage unless very strong reasons are shown that the withdrawal would not affect or prejudice anybody''s vested rights. The impugned judgment of the High Court in which a contrary view has been expressed cannot be sustained.

35. A right to withdraw a suit in the suitor would be unqualified, if no right has been vested in any other party. (See Bijayananda Patnaik v. Satrughna Sabu and Hulas Rai Baij Nath v. Firm K.B. Bass & Co.)

20. The language of Order XXIII Rule 1(1) provides that at any time after the institution of a suit, a plaintiff can abandon his suit or abandon a part of his claim.

21. The question in this revision is whether the plaintiff was bound to file an interlocutory application to withdraw the relief as to declaration of title in respect of the property which was subject matter of OS. No. 972 of 2006 or not

22. This issue is no longer res integra. This Court Allu Appalaswamy and Others Vs. Maturi Anjaneyulu and Others, considered this issue. In that case, a suit for dissolution of partnership and settlement of accounts had been filed against five defendants. Written statement was filed, issues were framed and the plaintiff''s examination was also completed.

(i) At that stage the plaintiff''s counsel orally represented to the court that the plaintiff, on the one hand, and the defendants Nos. 1, 3, 4 and 5 on the other hand, had arrived at a compromise and that the plaintiff desires to give up his case as against the 2nd defendant.

(ii) The plaintiff filed IA. No. 1007 of 1969 for recording the compromise between the parties excluding the 2nd defendant. The 2nd defendant filed IA. No. 1025 of 1969 under Order I Rule 10 CPC requesting the court to transpose him as 2nd plaintiff and transpose the plaintiff as 6th defendant. The 1st defendant also filed IA. No. 1026 of 1969 to dismiss the suit according to the terms of compromise and direct the 2nd defendant to institute a suit to enforce his right, if any.

(iii) The Trial Court dismissed IA. No. 1025 of 1969 but allowed IA. No. 1007 of 1969 and recorded the compromise. But it did not say specifically whether the suit of the plaintiff is dismissed as against the 2nd defendant as he was given up by the plaintiff. It also did not say that in view of the terms of the compromise, the plaintiff''s suit stands dismissed as against other defendants.

(iv) Nevertheless, the 2nd defendant preferred an appeal to the Sub-Court aggrieved by the orders of the trial court. The Sub-Court allowed the appeal and directed the trial court to proceed with the suit and allowed the 2nd defendant to lead evidence even if the plaintiff did not want to proceed with the case. This conclusion was based on the assumption that in a suit for dissolution of partnership, all the partners stand in the position of the plaintiff and each one of them can proceed with the suit as he is ultimately entitled to a decree in case he is found entitled to it.

(v) This was questioned by way of a revision in the High Court.

23. The Division Bench held that the appellate court went wrong in compelling the plaintiff to continue his suit as against the 2nd defendant although he had categorically abandoned the suit as against him. It held the trial court should have therefore dismissed the plaintiff''s suit as against the 2nd defendant under Order XXIII Rule 1 of CPC. It observed in that context as follows:

Now, under Order XXIII, Rule 1, C.P.C. at any time after the institution of a suit, the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim. According to sub-rule (2), where the Court is satisfied about the

defects in the suit, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of a claim. What follows this provision of law is that it is only when the plaintiff desires to file a fresh suit in respect of the same subject-matter or part of it that the permission of the Court is required. In other cases, the plaintiff is free to either withdraw the suit or abandon part of his claim as against all or any of the defendants. It is only in pursuance of this provision of law that the plaintiff abandoned the suit as against the 2nd defendant. It did not require any permission of the Court to dismiss the suit as abandoned against the 2nd defendant. Even in regard to the other defendants, although a compromise memo was filed, there was nothing in the terms of compromise which required a decree to be passed by the trial Court. In fact the application of the 1st defendant was that the suit should be dismissed in terms of the compromise. The recording of compromise would not alter the position that what was desired by the plaintiff was to withdraw his suit without the leave of the Court to institute a fresh suit as against all the defendants excluding the 2nd defendant because as against him, the plaintiff had already abandoned his claim. In any case, the compromise admittedly did not come under Order XXIII, Rule 3, C.P.C. but it came only under Order XXIII, Rule 1, C.P.C. It is fairly clear that a withdrawal under sub-rule (1) may be in any form; where the plaintiff enters into a compromise with the defendants but does not communicate the terms of compromise to the Court, he is held to have withdrawn his suit under sub-rule (1). Similarly, where a suit is dismissed at the request of the parties on a memo of compromise filed, the dismissal operates as a withdrawal of the suit under sub-rule (1). The result therefore was that although the trial Court had not specifically stated that the suit of the plaintiff would be dismissed in terms of the compromise even as against all the defendants other than the 2nd defendant, it will be deemed to have been so dismissed. In that view of the matter, it was really unnecessary for the 2nd defendant to go in appeal. He was perhaps justified in going in appeal because of the vague orders passed by the trial Court. If the trial Court had been a little more careful and explicit in its order the litigation which proceeded further could have been very well avoided.

24. Thus, there is no form necessary to be followed by a plaintiff if he intends to withdraw/abandon the suit or part of the suit claim either against a defendant or some of the defendants. In the case of A. Appalaswamy AIR 1974 AP 268 (D.B.) (supra), there was a representation orally by the counsel for the plaintiff that the plaintiff desires to give up his case as against the 2nd defendant and the court held that that such representation would suffice.

25. Therefore, in my opinion, the trial court is not correct in stating that unless an interlocutory application is filed by the plaintiff, he cannot be permitted to abandon the relief of declaration of title as to the suit mulgi (the 1st relief claimed in the plaint). Therefore the trial court ought to have accepted the memo filed by the

plaintiff and treated the said relief to have been abandoned/withdrawn. The provisions in the Civil Rules of Practice requiring the filing of an Interlocutory application cannot be deemed to be mandatory and as an impediment to withdrawal of the claim by the plaintiff. The fact that no decree would be passed is also irrelevant. As held in A. Appalaswamy AIR 1974 AP 268 (D.B.) (supra), the plaintiff is free to either withdraw the suit or abandon part of his claim as against all or any of the defendants as no right has accrued to the 2nd defendant in the suit. Therefore, the order dt. 20.06.2011 in Memo Sr. No. 1148 of 2011 in OS. No. 972 of 2006 is set aside and CRP. No. 4274 of 2011 is allowed. No costs.

26. Once CRP. No. 4274 of 2011 is allowed and the Memo Sr. No. 1148 of 2011 in OS. No. 972 of 2006 is accepted as sufficient, the relief of declaration of title sought by the plaintiff in OS. No. 972 of 2006 in respect of the plaint schedule property therein stands abandoned/withdrawn. As a consequence, the prayer in the plaint sought by the plaintiff restraining the 2nd defendant from interfering with the plaintiff''s peaceful possession and collecting rent of the plaint schedule property also stands abandoned as the said relief is inextricably connected with the first relief of declaration of title which has been abandoned by him.

27. In view of this, the issues which survive for consideration in OS. No. 972 of 2006 are only whether the plaintiff can seek eviction of the 1st defendant from the plaint schedule property apart from arrears of rent and damages. It is the plea of the plaintiff that the tenancy of the 1st defendant was terminated on 06.12.2005 and the court would consider whether such termination of tenancy of the 1st defendant is valid and the 1st defendant can continue in possession of the plaint schedule property. The court would also have to consider the claim of the plaintiff for arrears of rent and damages as against the 1st defendant. In this view of the matter, there is no issue which is common to the suit OS. No. 972 of 2006 and CCCA. No. 84 of 2011 arising out of OS. No. 334 of 2004. Consequently, there cannot be any stay of proceedings in OS. No. 972 of 2006 merely because CCCA. No. 84 of 2011 is pending on the file of the High Court.

28. The basic purpose and underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action/matter in issue so as to avoid possibility of contradictory verdicts by two courts in respect of the same relief. [National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara, and Aspi Jal and Another Vs. Khushroo Rustom Dadyburjor,]. Once the subject matter of OS. No. 972 of 2006 is confined to the issue of validity of termination of tenancy of the 1st defendant and his liability to pay arrears of rents/damages, there is no impediment to the trial of OS. No. 972 of 2006 as these issues are not subject matter of CCCA. No. 84 of 2011.

29. Therefore, CRP. No. 3033 of 2011 is allowed and the order dt. 23.06.2011 in IA. No. 401 of 2011 in OS. No. 972 of 2006 is set aside. No costs. Accordingly, both CRP.

No. 4274 of 2011 and CRP. No. 3033 of 2011 are allowed. No costs.