



**HIGH COURT OF ANDHRA PRADESH**  
WEDNESDAY ,THE FOURTH DAY OF MAY  
TWO THOUSAND AND TWENTY TWO

**PRESENT**

**THE HONOURABLE MS JUSTICE B S BHANUMATHI**  
**CIVIL REVISION PETITION NO: 557 OF 2018**

**Between:**

1. G APPARAO (DIED) Visakhapatnam

**...PETITIONER(S)**

**AND:**

1. GORLE DEMUDAMMA, W/O LATE KANNALU, AGED.71YRS, HINDU, COOLIE, HOUSEHOD DUTIES, RESIDING AT DR.NO.4-30, KOLURU VARI STREET, DEVARAPALLI VILLAGE, VISAKHAPATNAM DISTRICT.
2. THAMATAPU AMMAJI, W/O NANAJI, AGE.46YRS, HOUSEHOLD DUTIES, RESIDING AT LAKSHMI DEVI PETA, CHODAVARAM VILLAGE AND MANDALAM, VISKHPATNAM DISTRICT.

**...RESPONDENTS**

**Counsel for the Petitioner(s): T V SRI DEVI**

**Counsel for the Respondents: M V S SAI KUMAR**

**The Court made the following: ORDER**

**THE HON'BLE MS. JUSTICE B.S. BHANUMATHI****C.R.P. No.557 of 2018****ORDER:**

Sri Nemani Venkateswarulu, learned counsel, representing Ms. T.V. Sridevi, learned counsel for the revision petitioners, was heard on the previous day of hearing and there is no representation for the respondents/ plaintiffs on that day. Even today, there is no representation for the respondents. Sri Nemani Venkateswarulu, learned counsel, representing learned counsel for the revision petitioners, is present.

2. This revision petition is filed under Article 227 of the Constitution of India against the orders, dated 07.12.2017 passed in I.A.No.682 of 2017 in O.S.No.42 of 2010 on the file of the Court of the Senior Civil Judge, Chodavaram.

3. The petition in I.A.No.682 of 2017 was filed by both the plaintiffs under Order 23 Rule 1 read with Section 151 CPC by the first plaintiff seeking permission to withdraw the suit, with a liberty to file a fresh suit, if necessary. The same has been allowed after hearing both the parties. Aggrieved by the same, the present revision petition is filed.

4. The suit was originally filed for partition by two plaintiffs against the sole defendant. Thereafter, in view of death of sole defendant, his legal representatives were brought on record as defendant Nos.2 and 3 though it was opposed by the plaintiffs that they are not legal heirs of the



defendant. The trial Court directed the plaintiffs to add without prejudice to contest the plaintiffs. During the trial, the 2<sup>nd</sup> plaintiff was examined as P.W.1 and during the cross-examination of P.W.2, the defendants filed a registered Will Deed, dated 03.04.2002 stated to be executed by the husband of the first plaintiff. As per the Will, the plaint schedule properties were bequeathed in favour of the first plaintiff with absolute rights. Thus, the first plaintiff is the owner of the plaint schedule property. Except the first plaintiff, none other has any right over them. The first plaintiff came to know about the Will only after filing of the same in the Court by the defendants. The existence of the Will was wantonly suppressed by the defendant Nos.2 and 3 and came on record as Legal Representations. Under these circumstances, there is no need to continue the suit and as such, this petition is filed.

5. The defendant Nos.2 and 3/ respondent Nos.2 and 3 filed counter resisting the petition and denying the averments made in the petition and contending that the existence of the Will has been disclosed at Para 3 of legal notice marked as Ex.A4 issued prior to the institution of suit and also in Para 5 of the written statement filed by the first defendant on 31.08.2010 and thus, it is false that the petitioners have come to know about the Will only when it was filed in the cross-examination of P.W.1 and that this petition was filed only when plaintiffs found that the



evidence is against them and therefore, there are no *bona fides* for filing the petition. It is also contended that the defect in the suit is not formal and no substantial grounds are there to allow the plaintiffs to file fresh suit in the subject matter of the suit. Plaintiffs cannot be permitted to approbate and reprobate. The respondents prayed for dismissal of the said petition.

6. The trial Court allowed the petition on the ground that the knowledge of the petitioners/ plaintiffs about the Will is a question of fact, which has to be decided basing on the oral and documentary evidence on both sides, but at this stage, it is not possible to give any finding thereon and that, the permission to withdraw the suit can be granted as the plaintiffs sought the same relief and that, at the most, the respondents can insist for payment of costs, they cannot oppose the relief of withdrawal of this suit. The trial Court further observed that the entitlement of the petitioners to file a fresh suit cannot be barred and in the event of filing of a fresh suit, the respondents can put forth all the contentions in that suit.

7. Having aggrieved by such order, the revision petition was filed contending that the trial Court could not properly appreciate the scope of Order 23 Rule 1 of CPC and that as per Order 23 Rule 1(3) of CPC, the Court can grant permission if it is satisfied that the suit fails by formal defect and there are sufficient grounds for allowing the



plaintiffs to institute a fresh suit to the subject matter of the suit or part of the claim, but the respondents failed to put forth before the Court that there is any such formal defect in the institution of the suit or there are sufficient grounds for allowing them to file a fresh suit, however, the Court below allowed the petition.

8. Before advertng to the merits of the matter, it is apropos to mention the relevant provision of law under Order 23 Rule 1 C.P.C., which reads as follows:

“ORDER XXIII – WITHDRAWAL AND ADJUSTMENT OF SUITS

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 persons.

(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) .....

(5) .....

A reading of the provision makes it clear that the plaintiffs may abandon the suit or part of the claim against all or any of the defendants under Rule (1) sub-Rule (1) without any rider, except one mention in the proviso regarding the





- (3) Where the Court is satisfied-
- (a) that a suit must fail by reason or 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 claim.”
- (emphasis supplied)

As per Order 23 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 23 Rules 1(3)(a) or (b) CPC and must ask for leave. The Court can allow the application filed under Order 23 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 23 Rule 1(3) CPC is founded on public policy to prevent institution of suit again and again on the same cause of action.

He further relied on another Judgment of the Apex court in a case ***K.S. Bhoopathy and others Vs., Kokila and others***<sup>2</sup>, the relevant portion of which reads as follows:

“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.

---

<sup>2</sup> (2000)5 SCC 458



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 there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of 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. ....”

9. In the present case, the reason for withdrawing the suit is that the plaintiffs have no knowledge about the Will before it was filed in the cross-examination of P.W.1. This statement goes against the record before this Court. It is explicit from the contents of Ex.A4 and written statement. Thus, it is *ex facie* clear that the statement made by the petitioner in seeking the relief is false. Therefore, it does not require any more trial. The observation of the trial Court is that it is only during the trial, the knowledge about the existence of the Will was brought on record, is erroneous. There is no other ground pleaded by the petitioner. The case of the petitioners does not fall under the category of formal defect, nor is there any reason to fall within the scope of sufficient ground. As such, the trial Court ought to





have dismissed the petition. If at all, the plaintiffs want to withdraw the suit, deciding not to contest further in respect of the same property in view of the fact that the plaintiff schedule property was bequeathed in favour of the first plaintiff, the plaintiffs could have unconditionally withdrawn the suit. Learned counsel for the revision petitioners submitted that the defendant Nos.2 and 3 have no objection for unconditional withdrawal of the suit, but they are aggrieved only by the permission granted by the trial Court allowing the plaintiffs to file a suit afresh in respect of the same properties. Thus, since there is no merit in the petition filed by the plaintiffs seeking permission to withdraw the suit with a liberty to file a suit afresh, the petition is not maintainable in view of the circumstances already discussed above.

9. In the result, the Civil Revision Petition is allowed and the order, dated 07.12.2017 passed in I.A.No.682 of 2017 in O.S.No.42 of 2010 is set aside. Petition in I.A.No.682 of 2017 is dismissed. However, it is made clear that if the plaintiffs want to withdraw the suit unconditionally, it is open to them to take a decision.

10. As a sequel thereto, the miscellaneous petitions, if any, pending in this C.R.P., shall stand closed.

---

**B.S. BHANUMATHI, J**

Date: 04.05.2022  
Ks



**THE HON'BLE MS. B.S. BHANUMATHI**

**C.R.P No.557 of 2018**

**Date: 04.05.2022**

Ks