

ORDER BELOW EXH. 64

This application is filed by plaintiff seeking permission to withdraw the suit with liberty to file a fresh suit. Defendant no. 3 and 4 resisted the application by filing say.

2. It is contended by the plaintiff that, he has mentioned in plaint that suit property 'B' and 'C' are ancestral and joint family properties due to inadvertence and mistake. This serious mistake is realised by plaintiff now. Hence in order to overcome formal defect plaintiff wants to withdraw this suit with liberty to file a fresh suit.

3. Defendant no. 3 contended that suit is filed in 2012 to which defendant has filed his W.S. promptly. Plaintiff filed affidavit of examination-in-chief on 21/04/2016. Later on he filed a fresh affidavit of examination-in-chief on 08/03/2018. Hence it is not acceptable that he did not aware of the alleged mistake. Alleged mistake contended by plaintiff is not a formal defect. Plaintiff has filed this application to harass defendant. Hence prayed for rejection.

4. Defendant no. 4 contended that plaintiff admitted 1/2 share of defendant no. 4 in the suit properties. Defendant no. 4 has sought partition of his 1/2 share and claimed equitable relief and it needs to be considered in this suit only.

5. As per Order 21 Rule 3 of Code of Civil Procedure the court

can grant permission to withdraw suit if suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit. In this case plaintiff contended that he mistakenly and inadvertently mentioned the suit properties 'B' and 'C' as ancestral and joint family properties. According to her it is a formal defect. Ld. advocate of defendant no. 4 highly objected to call it as a formal defect. He argued that the defect is going to the root of plaintiffs claim and hence it is not a formal defect. He relied upon the case of Thakur Pd. and another Vs. Rasool Bux and another AIR 1950 Allahabad 489.

6. In the supra case it has been held that the expression 'formal defect' connotes defects of various kinds not affecting the merits of the case. As defect which goes to the root of the plaintiffs' claim is not a formal defect. Defects such as omission to obtain permission if necessary, of the necessary authority before bringing the suit, misjoinder of parties or causes of action, or erroneous valuation of the subject-matter of the suit or the institution of the suit in a Court which, has no jurisdiction to entertain the suit, are defects of a formal nature. But where the suit has failed because the plaintiff failed to produce evidence which he was bound to produce in support of his claim, he cannot be permitted to withdraw the claim with liberty to bring a fresh suit in respect of the same subject-matter.

7. Defendant no. 4 further relied upon the case of Tarachand Bapuchand Vs. Gaibihaji Ahmed Bagwan AIR 1956 Bombay 632. In which it has been held that failure to make a proper claim and failure

to implead parties in respect of the claim cannot be properly regarded as a formal defect, which is fatal to the suit within the meaning of Order 23 Rule 1 of Code of Civil Procedure.

8. In the contest of supra authorities alleged defect in the suit putforth by plaintiff is not a formal defect. It goes to the root of the matter. At the time of filing of the suit plaintiff was well aware of the fact of the status of the suit properties, more so the decision in R.C.S. No. 40/2005 and R.C.A. No. 39/2007. Therefore the ground that he mistakenly mentioned suit properties 'B' and 'C' as ancestral and joint family properties is not worthy of acceptance. The case is old one and posted for cross examination of plaintiff. It is not the object of the rule to enable plaintiff who has failed to prove his case to reagitate the matter and thus prejudice the other side. The application is devoid of merit. Hence I pass following order.

ORDER

Application is rejected.

Date : 03/01/2019.

(Salim A. Jamadar)
Civil Judge (J.D.) Kankavali.