



GAHC010214702022

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : CRP(IO)/249/2022

ABDUL BAREK
S/O LATE TOIYOB ALI, R/O VILL-NABAGOTA SIMLITOLA, P.O.-SIMLITOLA,
P.S.-MATIA, DIST-GOALPARA, ASSAM

VERSUS

MAHALI SHEIKH AND 3 ORS
S/O LATE TOSER ALI @ TUSOR ALI, R/O VILL-NABAGOTA, SIMLITOLA,
P.O.-SIMLITOLA, P.S.-MATIA, DIST-GOALPARA, ASSAM, PIN-783129

2:NAUSAD ALI
S/O LATE TOIYOB ALI
R/O VILL-NABAGOTA
SIMLITOLA
P.O.-SIMLITOLA
P.S.-MATIA
DIST-GOALPARA
ASSAM
PIN-783129

3:THE ASO MATIA REVENUE CIRCLE
MATIA
P.O. AND P.S.-MATIA
DIST-GOALPARA
ASSAM
PIN-783129

4:THE DISTRICT COLLECTOR (DC) GOALPARA
P.O.-BALADMARI
P.S. AND DIST-GOALPARA
ASSAM
PIN-78312



BEFORE
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI
JUDGMENT & ORDER

Advocate for the petitioner: Shri M.K. Sharma, Advocate
Advocate for respondents : Shri K. Phukan, Government Advocate.

Date of hearing : 14.08.2023
Date of judgment : 14.08.2023

1. Heard Shri M.K. Sharma, learned counsel for the petitioner, who has filed the instant petition under Article 227 of the Constitution of India against an order dated 03.08.2022 passed by the learned Munsiff No. 1., Goalpara whereby a petition filed under Order 23 Rule 1 (3) of the CPC in Title Suit No. 25/2018 has been rejected. I have also heard Ms. K. Phukan, the learned Government Advocate.

2. The petitioner, as the plaintiff had instituted the aforesaid suit for declaration of right, title, interest and recovery of a possession pertaining to a plot of land. The suit was contested by the private respondent whereas it proceeded *ex-parte* against the State respondents. It is also the admitted case that the plaintiff's evidence through three witnesses were given by way of affidavit and PW1 was also cross examined. However, at that stage, the application under Order 23 Rule 1 CPC was filed for withdrawal of the suit with



liberty to institute a fresh suit.

3. Shri Sharma, the learned counsel for the petitioner by referring to the said petition filed under Order 23 Rule 1 (3) CPC has submitted that in paragraph-2 thereof, a formal defect was pointed out and in paragraph-3, a specific plea was taken on the ambiguity in the description of a part of the suit land. It is further submitted that though an observation has been made in the impugned order that the new set of counsel had entered appearance by filing Vakalatnama on 20.12.2019 and the amendment was sought for only on 11.02.2021, the learned counsel has submitted that in between, there were only four dates whereafter due to the Covid pandemic, there were no effective sittings and therefore, it cannot be said that there was inordinate delay. It is further submitted that in paragraph-3 of the plaint while stating the description, certain details were left out which can be termed to be formal defects.

4. Shri Sharma, the learned counsel accordingly submits that the order dated 03.08.2022 is liable to be interfered with.

5. *Per contra*, Ms. K. Phukan, learned State Counsel appearing for the respondent nos. 3 & 4 has submitted that an affidavit-in-opposition has been filed on 27.06.2023 and in paragraph 4 thereof, a specific objection has been raised that the plaintiff witnesses have already filed their chief examination and the PW1 has already been cross examined. It is accordingly submitted that, if at this stage, the suit is allowed to be withdrawn with a liberty, that will amount to giving a scope to fill in the lacuna whereby prejudice would be caused to the contesting defendants.

6. Rejoining his submissions, Shri Sharma, the learned counsel for the petitioner has submitted that the stand taken by the learned Government Advocate may not be relevant as no relief has been sought for from the Government and in any case, the suit had proceeded *ex-parte* against the Government.

7. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been duly examined.

Order 23 Rule 1 (3) CPC reads as follows:

“1. Withdrawal of suit or abandonment of part of claim.

(1)...

(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)...”



8. While Order 23 Rule 1 CPC provides for taking leave of the Court to withdraw a suit or any part thereof, Rule 3 is the provision under which a permission to withdraw may be granted with a liberty to institute a fresh suit. The said Rule 3 has laid down two ingredients which are disjunctive as would be clear by use of the expression "or". The first condition is that the Court is to be satisfied that the suit must fail by reason of some formal defect and the alternative condition is that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or a part of a claim. The presence of any of the aforesaid reason is however qualified by use of expression "may" wherein the element of discretion would be involved as even under availability of any of the said conditions, it is up to the discretion of the Court to grant permission to the plaintiff to withdraw the suit or any part thereof with a liberty to institute a fresh suit.

9. In the instant case, though it is submitted that the plaint had suffered from some formal defect and there were ambiguities in the description, what transpires is that though the suit is of the year 2018, such application was filed only in the year 2021 and considered on 03.08.2022 on which date the same was dismissed. What is significant to note is that in the meantime, the plaintiff witnesses had submitted their Chief Examination by way of affidavit and in the meantime, the PW1 who is the plaintiff himself has also been cross-examined. Thereafter, filing an application under Order 23 Rule 1(3) CPC on the grounds of the suit having formal defect does not appear to be one which is accompanied by diligence.

10. This Court is also not impressed with the ground taken that there were



change in counsel as such change will not make any material difference with the requirement of the statute which lays down the conditions by which such a prayer is required to be considered and disposed of.

11. The learned Munsiff has also referred to the case of the Hon'ble Supreme Court in the case of **V. Rajendran v. Annasamy Pandian**, reported in **(2017) 5 SCC 63** wherein the expression formal defects has been explained. Shri Sharma, the learned counsel has however tried to contend that the aforesaid judgment was rendered under different circumstances and therefore would not be applicable.

12. This Court is however not in a position to accept the said submission as it is only the interpretation and meaning of formal defect which has been given in the said judgment by the Hon'ble Supreme Court which is material for adjudication of the present list.

13. In the considered opinion of this Court, the order dated 03.08.2022 contains adequate reasons and discussions before coming to a conclusion that the application was not liable to be favorably considered for the petitioners.

14. This Court can otherwise also not be oblivious of the limited role to be played as a Court exercising supervisory jurisdiction under Article 227 of the Constitution of India. Unless the impugned order suffers from jurisdictional error or is palpably erroneous, this Court in exercise of such jurisdiction would be loath to interfere with exercise of discretion which, in this case appears to be done by taking into consideration the relevant facts and circumstances.



15. The Hon'ble Supreme Court in the case of ***Rafat Ali v. Sugni Bai, reported in (1999) 1 SCC 133*** has laid down as follows:

“8. The appellation given to the section makes it unmistakably clear that the power conferred thereunder is revisional which means, it is a power of supervision. It is well-nigh settled that a revisional jurisdiction cannot be equated with appeal powers in all its parameters. The power to call for and examine the records is for the purpose of the High Court to satisfy itself as to the "legality, regularity or propriety" of the order of the lower authority. Even such a widely-worded frame of the section may at best indicate that the revisional powers are not so restricted as in the enactments wherein the words are not so widely framed. Nonetheless, they remain in the realm of supervisory jurisdiction...”

16. In that view of the matter, the instant petition stands dismissed.

JUDGE

Comparing Assistant