Civil Revision No.8 of 2016.

19.04.2017:-

Shri S.C.Agrawal, learned counsel for the petitioner.

Shri S.L.Gwaliory, learned counsel for the Respondents.

Heard on the question of admission.

O R D E R

THE plaintiff has filed the present revision being aggrieved by order dated 30.09.2015 by which the appellate Court has permitted the plaintiff to withdraw the suit without liberty to file a fresh suit.

[2] Facts of the case, in short, are as under :-

(a) That Late Gordhanlal filed the suit for declaration of his title before the Civil Judge, Class-I, Sailana, District Ratlam that the House Nos.38 and 39 are an ancestral property and being legal heir of Late Bhuribai he is entitled for 1/3rd share along with his brother and he is entitled to get mutation in his name. Except the defendant No.1, defendant Nos.2 to 5 have supported the plaint of the plaintiff and admitted the oral partition.

(b) Vide judgment and decree dated 27.04.2012, the learned Civil Judge, Class-I, Sailana has dismissed the plaint of the plaintiff on Issue Nos.1 and 2. The suit was also dismissed as time barred.

(c) Being aggrieved by the aforesaid judgment and decree, the plaintiff preferred first appeal. During the pendency of first appeal, Gordhanlal has died and his son

Mukesh was brought on record as legal heir. In a pending appeal, the legal heir of the original plaintiff filed an application under Order XXIII Rule 1 of CPC for withdrawal of plaint on the ground that Late Gordhanlal had no knowledge of law, therefore, he could not present the suit in a proper manner and he wishes to file a fresh suit. Looking to the circumstances of relevant time, the plaintiff was not in a position to properly present his case, therefore, he is seeking permission to withdraw the suit with liberty to file a fresh suit.

(d) The aforesaid application was opposed by the defendants that the appellant may withdraw his suit but he is not entitled for liberty to file a fresh suit as there is a collusion between the plaintiff and the defendant Nos.2, 3 and 4. They wanted to fulfill the lacuna to bring the suit within limitation.

(e) Learned appellate Court vide order dated 30.09.2015 has allowed the application only in respect of withdrawal of the suit and declined liberty to file a fresh suit. Hence, the present revision before this Court.

[3] Shri S.C.Agrawal, learned counsel appearing on behalf of the petitioner submits that when the Court is granting permission to withdraw the suit, then the Court is bound to grant liberty to file a fresh suit. The learned appellate Court without considering the material on record has wrongly exercised its discretion by partly allowing the application. In support of his contention, he

has placed reliance on the decisions in the case of ***Mario Shaw*** v/s ***Martin Fernandez*** [AIR 1996 Bombay 116], ***D.P. Sharma*** v/s ***Banglore Mahanagara Palike*** [AIR 2001 Karnataka 401] and ***M.Subba Rao*** v/s ***Vasanth*** [AIR 2015 Hyderabad 68] and prayed for setting-aside of the impugned order so far as it relates to refusal to grant liberty to file a fresh suit.

[4] Per contra, Shri S.L.Gwaliory, learned counsel submits that it is a pure discretion of the Trial Court whether to grant liberty or not and it is not for this Court to interfere with the discretionary order passed by the Subordinate Court in writ petition under Article 227 of the Constitution of India.

[5] I have heard learned counsel for the parties.

[6] The only controversy involved in this revision is whether while granting permission to withdraw the suit, the plaintiff as a matter of right can seek liberty to file a fresh suit. Sub-rule (3) of Rule 1 of Order XXIII of CPC is reproduced below :-

> **"(3) Where the Court is satisfied,--**
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> **(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.**

[7] The sub-rule (3) starts with the condition that "where the Court is satisfied that there are sufficient ground for allowing the plaintiff to institute a fresh suit for the same subject-matter, then the Court may permit, as it thinks fit". Therefore, satisfaction of the Court is important to the effect of availability of sufficient ground to grant permission to withdraw the suit with liberty to file a fresh suit. The ground which was given by the petitioner for withdrawal of the suit that original plaintiff i.e. his father had no knowledge about the law, therefore, he could not present the suit properly, hence he be permitted to file fresh suit. Para 2 of the application is reproduced below :-

> "यह हैं कि प्रकरण में वादीगण के पूर्व अभिभाषक द्वारा प्रतिवादीगण के वादोत्तर आने के उपरान्त और वादी का 1@3 हिस्सा कुछ प्रतिवादी द्वारा स्वीकार कर लेने के उपरान्त भी प्रकरण में सहीं रूप से सहायत नहीं चाहे जाने से वादी का वाद निरस्त कर देने से प्रस्तुत की हैं। चूंकि वादी मृतक गोरधनलाल धबाई को कोई कानुनी ज्ञान नहीं था इस कारण से वह प्रतिवादीगण के विरूद्ध सहीं रूप से अपना वाद प्रस्तुत नहीं कर सकें। लेकिन प्रकरण की स्थितियों को देखते हुए अब वादीगण सहीं रूप से अपना वाद नवीन रूप से प्रस्तुत करना चाहते है, जिसके लिये वादीगण यह वाद विड्रा कर नवीन रूप से वाद प्रस्तुत करने की अनुमति माननीय न्यायालय से प्राप्त करना चाहता है। "

[8] It is important to mention here that the Trial Court vide detailed order has dismissed the suit holding that the plaintiff has failed to prove hig right to claim 1/3rd share in the property. Even the Trial Court has found that the suit for declaration is time barred. Para 17 of the order is reproduced below :-

> **"17.** प्रतिवादी 2 लगायत 4 प्रस्तुत किये वादोत्तर में तो वादी के बटवारे संबंधी अभिवचनों का समर्थन करते है परंतु उनके द्वारा उक्त संबंध में अपने अभिवचनों के समर्थन में न्यायालय में उपस्थित होकर शपथ पर कोई कथन नहीं किया है। जिस कारण भी वादी के कथनों की पुष्टि होना नहीं मानी जा सकती। और यह तथ्य

प्रमाणित नहीं होता है कि वादी को वादग्रस्त संपत्ति बटवारे में प्राप्त हुई थी साथ ही वादी ने अपने प्रतिपरीक्षण के चरण 33 में यह स्वीकार किया है कि प्रतिवादी बाबूलाल द्वारा उसके नाम नामातंरण कराने से इंकार 15 साल पूर्व किया गया था और 15 साल से लगातार वर्ष 2008 तक उसने बाबूलाल के विरूद्ध कोई कार्यवाही नहीं की ऐसे में जब वादी का मात्र स्वत्व घोषणा का वाद है तो उसका वाद परिसीमा बाहय भी है क्योंकि स्वत्व घोषणा परिसीमा काल 3 साल है और ऐसी दशा में वादी स्वत्व घोषणा कराने का अधिकारी नहीं है। ”

[9] In the case of ***M.S.Subba Rao*** (supra), the Division Bench of Hyderabad High Court has held that - “If the suitor wants to bring fresh action on the self-same cause of action while asking for withdrawal of lis, then the power to allow such prayer is left with discretion of the Court and not with choice of the suitor. In other words, the suitor cannot claim, as a matter of right, the liberty to bring a fresh action on the self-same cause of action”. Para 4 of the order is reproduced below :-

> **“4. While reading the aforestated provision, we are in agreement of with Sri Vedula Venkataramana, learned senior Advocate. It is the absolute right of the suitor as the suitor can bring his lis of his own choice and wishes. Neither the Court nor anyone else can compel any person to come to the Court. With the parity of reasoning after having brought action, the litigant decides not to continue with his lis, such decision is final and no one can sit on that claim. We feel that asking for leave is only matter of courtesy and respect and grant of leave is matter of course not of discretion and it is manifest in Clause (b) sub-rule (3) of Rule 1 of the Code, wherein words “may grant” are employed. If the suitor wants to bring fresh action on the self-same cause of action while asking for withdrawal of lis, then the power to allow such prayer is left with discretion of the Court and not with choice of the suitor. In other word the suitor cannot claim, as a matter of right, the liberty to bring a fresh action on the self-same cause of action. Clause (b) sub-rule (4) of Rule 1 of the Code wherein like Clause (b) sub-rule (3) of Rule 1 of the Code words “may grant permission” are not mentioned.”**

That, the judgment cited by the petitioner itself speaks contrary to his stand.

[11] There has to be a sufficient ground for

allowing the plaintiff to institute a fresh suit but the ground raised in application under Order XXIII Rule 1 of CPC cannot be treated as sufficient ground as ignorance of the law cannot be a ground. The legal heir of original plaintiff i.e. the present petitioner has stated that his father had no knowledge about the law to file a proper suit. This cannot be treated as a sufficient ground to grant the liberty to file a fresh suit specially when the Trial Court has dismissed the plaint and at the appellate Court stage the plaintiff filed an application under Order XXIII Rule 1 of CPC. The Trial Court has rightly exercised its discretion which does not call for any interference.

[12] Hence, the revision is **dismissed**.

No order as to costs.

[VIVEK RUSIA]
JUDGE

(AKS)