
(2002) 02 AP CK 0142

In the Andhra Pradesh High Court

Case No : Crp. No's. 3101 and 3102 of 2001

Ahmed Abdul Saleem and Others

APPELLANT

Vs

Ahmed Abdul Sameer and Others

RESPONDENT

Date of Decision : 12-02-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 23 Rule 1A

Citation : (2002) 4 ALT 470 : (2001) 1 APLJ 29

Hon'ble Judges : Dubagunta Subrahmanyam, J

Bench : Single Bench

Advocate : Mirza Imamulla Baig, for the Appellant; M. Sudhakar Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Dubagunta Subrahmanyam, J.—These two revision petitions are filed by some of the defendants in O.S.No.13 of 1998 on the file of Junior Civil Judge at Armoor. The parties as they are arrayed in the trial court suit will be referred as such in this order.

2. The plaintiff filed the suit for partition and separate possession of his undivided 7/242nd share in the suit property. In para 5 of the plaint he mentioned the distinctive shares of defendants 1 to 19 as well as his share. Defendants 1 to 9 and 11 to 13 jointly filed a written statement in the suit. They admitted the claim of the plaintiff and stated that the court may be pleased to decree the plaintiff's suit. The above defendants are the revision petitioners in these two revision petitions. After the written statements are filed by the defendants, the trial court settled the issues for trial. Thereafter the suit was posted for trial to 21.7.2000. Defendant No.14 filed a petition in I.A.No.104 of 2000 requesting the court to advance the suit from 21.7.2000 to 5.7.2000. Without notice to the other defendants, the trial court advanced the suit to 5.7.2000. On the same day i.e., on 5.7.2000, plaintiff filed a memo stating that he does not wish to prosecute the suit. The suit was dismissed without

costs. Aggrieved by the dismissal of the suit as withdrawn, the present revision petitioners filed C.R.P.No.2724 of 2000 on the file of this court. A learned single Judge of this court, by his order dated 16.11.2000, set aside the order of the trial court passed on 5.7.2000 dismissing the suit. The suit was restored to file. The trial court was directed to give notice of restoration of the suit to the counsel for the parties and fix a date for hearing and give an opportunity of being heard to the revision petitioners on the memo of withdrawal of the suit filed by the plaintiff and then pass appropriate orders. In pursuance of the said order, the trial court restored the suit to file.

3. Thereafter the revision petitioners herein filed a petition under Order I Rule 10 r/w Order XXIII Rule 1-A C.P.C., to transpose the plaintiff as a defendant and the petitioners-defendants as plaintiffs in the suit. They pleaded that they being the legal heirs of Abdul Nabi Saheb are entitled to be transposed as plaintiffs as they have got identical interest with the plaintiff to continue the suit. The plaintiff and the remaining defendants in the suit filed separate counters and opposed the application. They took the plea that the petitioners therein are not the contesting defendants in the suit and therefore they cannot be transposed as plaintiffs. On a consideration of the respective contentions advanced by both the parties, by his order dated 4.6.2001 the learned District Munsif dismissed I.A.No.3 of 2001. Aggrieved by that order, C.R.P.No.3102 of 2001 is filed.

4. On the memo of withdrawal filed by the plaintiff, defendants 1 to 9, 11 and 12 filed a counter. They pleaded that in the partition suit, the position of the defendants is same as that of the plaintiff, the interest of the defendants 1 to 9, 11 and 12 are identical to that of the plaintiff in the suit, plaintiff admitted the shares of the defendants, the plaintiff and defendants are the joint owners and possessors of the suit property and defendants 1 to 9, 11 and 12 have got a right to be transposed as plaintiffs. They requested the court to reject the memo of withdrawal. On the memo of withdrawal, on 4.6.2001 the trial court passed a separate order. The court ordered that the memo of withdrawal is recorded and accordingly the plaintiff is permitted to withdraw the suit. Aggrieved by that order, C.R.P.No.3101 of 2001 is filed.

5. Reliance was placed on behalf of the revision petitioners on the provisions under Order XXIII Rule 1-A C.P.C. This provision was inserted recently by Amendment Act of 1976 with effect from 1.2.1977. The provision reads as follows:

Order XXIII Rule 1-A:

" Where a suit is withdrawn or abandoned by a plaintiff under rule 1, and a defendant applies to be transposed as a plaintiff under rule 10 of Order I, the court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants"

6. According to this provision when a plaintiff seeks withdrawal of the suit or

abandons the suit, if a defendant applies to be transposed as plaintiff under Order I Rule 10 C.P.C., while considering the application for withdrawal, the court shall have regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants. Therefore, to get transposed from the array of defendants to the array of the plaintiffs in a suit, the applicants must satisfy the court that they have got a substantial question to be decided as against any of the other defendants. Unless the petitioners-defendants satisfy the court that a substantial question is to be decided by the court in the suit, after the plaintiff withdraw the suit, they are not entitled to be transposed as plaintiffs in the suit.

7. It is already noticed that the revision petitioners filed a written statement admitting the claim of the plaintiff in the suit. They did not request the court to divide their respective shares in the suit property and allot to each of them their respective shares after partition by metes and bounds. This is one of the circumstances to be kept in mind.

8. In para 7 of the plaint the plaintiff pleaded that on 5.2.1998 he requested the defendants 1 to 12 for partition of the suit land, but they have not given any heed to the request of the plaintiff. In para 4 of the written statement, the defendants 1 to 9 and 11 and 12 stated that they admit the contents of para 6 and 7 of the plaint to be true. It amounts that they admit that they did not agree for the partition of the suit property as required by the plaintiff.

9. As per the pleadings, they have admitted for the division and separate possession of the share of the plaintiff's land. They did not claim that their shares have to be separated from the shares of the other defendants in the suit. Therefore, after the plaintiff withdraws the suit, in my considered opinion, there is no substantial question to be decided between them and the other defendants of the suit, namely, defendants 13 to 19. If they had requested the trial court or made a counter claim in the written statement seeking division of their respective shares and delivery of separate possession of their respective shares, it can be construed that after the plaintiff withdraws his claim, there is a substantial question to be decided between the present revision petitioners and defendants 13 to 19 in the suit.

10. The learned counsel for the revision petitioners relied upon a judgment of Gujarat High Court in JETHIBEN Vs. MANIBEN (1). This decision deals with the principle of law applicable to a petition seeking transposition of defendant as plaintiff when the plaintiff wants to withdraw the suit. It is held in this decision that to be transposed as a plaintiff, the defendant who claims to be transposed must have interest identical with the interest of the plaintiff. In my considered opinion the identical interest is quite different from identical rights between the parties. The plaintiff may be having a share in the suit property. Some of the defendants in the suit may also be having different shares in the suit property. It does not amount to identical interest in the suit property. By filing the suit, the interest of the plaintiff is to get his share separated from the shares of the other

persons having joint right or interest in the suit. When some of the defendants share the interest of the plaintiff and then request the court to separate their respective shares also by partition by metes and bounds, then it can be said that the other defendants have got an identical interest in the suit property similar to the interest of the plaintiff.

11. It is further observed in the above judgment as follows:

" In collusion with the contesting defendant, such a plaintiff may some time decide to withdraw the suit. In order not to defeat the claim of pro forma defendant who has an identical interest with the plaintiff by such a withdrawal, provision of O. 23 R. 1-A of the Code is made so that pro forma defendant or the defendant can be transposed as a plaintiff and the suit as filed by the plaintiff can be effectively proceeded against the defendant who has remained on the record as defendant. This is what the spirit of O. 23 R. 1-A of the Code shows because in such cases the applicant (defendant) applying to be transposed as plaintiff has a substantial question to be decided as against any of the remaining defendants"

12. It is further observed in the same judgment as follows:

" Courts would not permit such transposition just to give a chance to a litigant to avoid filing a suit or permit him to take advantage of the suit filed by his adversary against him claiming a relief against him by becoming a plaintiff and trying to bring out the averments and reliefs which are contrary to those claimed by the original plaintiff. It is true that the provision of O. 23 R. 1-A is new, but that would not change the character and requirement of transposition. It merely permits that if the plaintiff withdraws the suit, the defendant can request the court to transpose him as plaintiff if the substantial question has to be decided against the remaining defendant".

13. The present revision petitioners are not pro forma defendants. In some suits it is known that plaintiff seeks partition and separate possession of not only his share and also some of the defendants in the suit and adds those defendants as pro forma defendants. In such a suit, if the plaintiff suddenly withdraws the suit during the pendency of the suit, the pro forma defendants in whose interest the suit was also filed will suffer injustice if the plaintiff suddenly withdraws the suit. Those are the persons who can come on record as plaintiff by transposing them as plaintiffs when the original plaintiff for some reason or the other tries to withdraw the suit. In the present suit, as already pointed out, the defendants did not claim or make a request to the court to divide their separate shares and deliver separate possession to them.

14. The learned counsel for the revision petitioners relied upon a judgment of this High Court in NEMURI SAYANNA Vs. NEMURI SRIHARI & OTHERS (2). As per the facts of that case, the plaintiff sued for partition. He filed a memo later stating that he is not pressing the suit. The court did not pass orders on that memo. Meanwhile the second defendant filed a petition in I.A.No.974 of 1992

requesting the court to transpose him as a plaintiff. By consent of the parties, the said petition was allowed. Thereafter that order was challenged in the revision petition. In the revision petition it was contended that the moment the plaintiff filed the memo abandoning the suit, it amounts to dismissal of the suit, the court thereafter became functus officio and it cannot allow the application in I.A.No.974 of 1992. The High Court held in the above decision that the other parties did not have an objection and the trial court passed the impugned order, which is a consent order, and as it is a consent order, it cannot be challenged by way of revision. Accordingly this court dismissed the revision petition. It is thus clear that this decision has no application to the facts of the present case.

15. I have already stated supra that in C.R.P.No.2724 of 2000 this court set aside the order permitting the plaintiff to withdraw the suit and directed the trial court to restore the suit to file and dispose of the withdrawal memo after giving notice to the other defendants and hearing them. In that order my learned brother Mr. Justice C.Y. Somayajulu observed as follows:

" If the defendants in suit for partition do not seek separation of their share in the suit property, and admit the claim of the plaintiff for partition of his share, it is doubtful if the defendants can be said to be in the position of a plaintiff, because a plaintiff seeks some relief on the suit. When no relief is claimed by the defendant, like seeking separation of his or her share, and files a written statement admitting the claim of the plaintiffs, how can it be said that he is in position of a plaintiff?It is well known that when one of the several co-owners or co-sharers seeks partition of his share, the other co-owners or co-sharers can continue to be joint, or also may get separated".

Those observations support the view taken by me in this order in view of the facts and circumstances of the present case. I, therefore, find that the trial court did not commit any error in refusing permission to the revision petitioners to transpose them as plaintiffs and then permitting the plaintiff to withdraw the suit. I, therefore, do not find any merits in the present revision petitions.

16. In the result, the Civil Revision Petitions are dismissed. No costs.