

(2003) 03 KAR CK 0051

In the Karnataka High Court

Case No : Civil Revision Petition No. 606 of 2003

Channabasappa Yallappa Karaddi

APPELLANT

Vs

Hanamappa Channabasappa Karaddi

RESPONDENT

Date of Decision : 20-03-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 18 Rule 16, Order 18 Rule 2, Order 18 Rule 2 (4), 151

Citation : (2003) ILR (Kar) 1507 : (2003) 3 KarLJ 584 : (2003) 4 KCCR 2880

Hon'ble Judges : S.R. Bannurmath, J

Bench : Single Bench

Advocate : Jayakumar S. Patil, for the Appellant; Subash B. Adi, for the Respondent

Final Decision : Allowed

Judgement

Bannurmath, J.—Heard the learned Counsel for the petitioner and the contesting respondent.

2. The petitioner/defendant No. 1 in O.S.No. 202/2002 filed I.A.No. VI under Order 18 Rule 16 read with Section 151 of CPC for getting himself examined out of turn. The said suit is filed by the respondent/plaintiff praying for decree for partition and separate possession against the petitioner (father), mother and sister. The petitioner/defendant has opposed the prayer by filing written statement inter alia taking one of the grounds of prior partition in the year 1953.

3. In this suit, the petitioner has come up with the aforesaid application inter alia contending that he is aged 84 years, he is suffering from heart ailment and low blood pressure and as he is uncertain of his life, wants to get examined himself at the earliest before the death strikes him.

4. This application was opposed by the plaintiff/respondent inter alia contending that the application is not true or bona fide and is also not maintainable. It is contended that the application is hit by Section 11 of CPC as similar application

filed by the petitioner has been rejected by the Court below earlier and which order has become final. The plaintiff also denied the sickness or otherwise or impending death of the defendant inter alia stating that the defendant is hale and healthy and although he is 84 years old, has been attending the Court regularly. As such, there was no sufficient cause shown. On consideration of the application and the objections raised, the Trial Court by the impugned order dated 5.2.2003 has rejected the application of the petitioner/defendant. Hence the present revision petition.

5. The learned Counsel appearing for the petitioner vehemently contended that the impugned order is contrary to law and evidence on record and that there is no proper application of mind on the part of the Court below while rejecting the prayer of the petitioner. It is contended that even though the order runs in several pages, the conclusion arrived at by the Trial Court to reject the petitioner's prayer is as follows:

"Thus, considering all these aspects, in my opinion, the decisions relied upon by the 1st defendant will not come to his aid and the procedure prescribed cannot be deviated. As the 1st defendant has not deposed that he would come as a witness, in my opinion, he cannot be permitted to adduce his evidence forthwith and thus point No. 1 is answered in the negative. A similar application was moved by the 1st defendant as per I.A. 3 and though the provisions quoted therein were not applicable, it was also dismissed. In my opinion, the order on I.A.-3 will not act as resjudicata to the present application, as LA. 3 was not decided on merits. Thus, the point No. 2 is answered in the negative."

It is contended that no doubt, the earlier application of the petitioner which was filed under Order 18 Rule 2(4) CPC was dismissed as not maintainable in view of the amendment of CPC, the order of rejection of that application cannot act as resjudicata against the present application. It is also contended that the objects under Order 18 Rule 2(4) CPC (prior to amendment) are totally different from the provisions of Order 18 Rule 16 CPC. It is contended that under Order 18 Rule 2 CPC, normal procedure is prescribed as to procedure to be adopted by the Trial Court while commencing the recording of evidence but to this an exception is provided under Order 18 Rule 16 CPC. It is submitted that though in the erstwhile provision under Order 18 Rule 2(4) CPC there was an exception prescribed for the procedure, permitting any party to examine any witness at any stage, which was a general exception but the exception provided under Order 18 Rule 16 CPC is specific one. Hence on these among other grounds, it is contended that the impugned order is liable to be set aside and the application of the petitioner is liable to be allowed.

6. On the other hand, the learned Counsel appearing for the contesting respondent argued in support of the findings of the trial Court to contend that it is well-settled procedure and as even provided under Order 18, the right to examine witnesses in support of the case is always first with the plaintiff as the burden to prove of his case rests mainly upon himself and it is only when the

plaintiff succeeds in discharging the burden, the burden of proving otherwise, shifts on the defendant. It is contended that in a given case, if the plaintiff fails in discharging his burden, there would not be any question of defendant examining himself prior to the plaintiff and hence it is submitted that as the scheme of procedure provided under Order 18 clearly indicates the right to begin is only with the plaintiff and cannot be under any circumstances be given to the defendant himself. It is in this light it is submitted that even Order 18 Rule 16 CPC has to be in that manner and hence unless the plaintiff has begun his evidence, it is impermissible for the defendant to get himself examined which would practically amount to putting cart before the horse. It is also contended, no doubt the Trial Court has rejected the contention of the plaintiff regarding Section 11 CPC, that finding is also erroneous one in view of the clear provision especially, Explanation IV to Section 11 CPC and as such, the application is also barred by the principles of resjudicata. Taking into consideration all these aspects, it is submitted that looking at the case from any angle, the Trial Court was justified in rejecting the prayer of the petitioner herein.

7. There is no dispute that Order 18 prescribes procedure as to how a hearing of the suit must be commenced and in what order the examination of witnesses must be done. Under Rule 1 of Order 18 CPC, it is prescribed that "the plaintiff has right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has right to begin". In my view, the second portion in this provision itself creates first exception to the general procedural rule that it is right of the plaintiff to begin or commence the evidence to be given. The wordings "either in point of law or on some additional facts alleged by the defendant, the plaintiff is not entitled to any part of the relief which he seeks", in which case, the defendant has the right to begin. Thus on perusal of this rule, it cannot be definitely stated that it is only the plaintiff who has right to begin. Of course, as noted in the said rule itself, exception has been provided. The second exception which was provided under the old CPC was in the form of Order 18 Rule 2(4) which reads thus, "notwithstanding anything contained in this rule, the Court may, for reasons to be recorded, direct or permit any party to examine any witness at any stage". This provision has been now amended by C.P.C. (Amendment) Act, 1999, that is to say, that Order 18 Rule 2 Sub-rule (4) CPC has been deleted. Another exception to this Rule which appears to me is Order 18 Rule 3(a) and then, Order 18 Rule 16 CPC. All these three independent provisions enlarge the scope and power of the Court as to how trial should commence and by whom, as well as in what order witnesses to be examined. The only change in the amended Procedure Code is deletion of Sub-rule (4) of Rule(2) of Order 18 CPC, that is to say, the power of the Court directing or permitting any party to examine any witnesses at any stage has been taken away. At this stage itself, it should be noted that the earlier application filed by the petitioner under Order 18 Rule 2(4) has been rejected as not maintainable.

In view of this amendment, namely, deletion of provision of Sub-rule (4) of Rule 2 of Order 18 CPC, it is contended by the petitioner that he is forced to file application under Order 18 Rule 16 CPC which has remained unaltered or unamended. By reading of these two provisions i.e., provisions prior to amendment and after amendment and giving a homogeneous construction, it appears to me that the general exception under Sub-rule (4) of Rule 2 of Order 18 CPC a party whether plaintiff or defendant, could choose the order of witnesses to be examined but the Rule 16 of Order 18 CPC is an exception of totally different kind. Under this Rule, if a party to the suit convinces the Court that a witness (material) is about to leave the jurisdiction of the Court or there is possibility of his not getting examined immediately, it is open for the Court to examine such witness totally out of turn. In my view, the prayer and submission of the petitioner in this application under Order 18 Rule 16 that he is of right age of 84 years, suffering from heart ailment which is supported by medical evidence produced along with the application and as such, he apprehends the oncoming death at any time or apprehension in his mind that without examining himself at the earliest, his defence would be lost for ever, cannot be said to be a "sufficient cause". On reading of the provision, in my view, this exception under Order 18 Rule 16 CPC is further exception to the general exception provided under old Order 18 Rule 2(4) CPC, which now stands amended and deleted.

8. Although the Trial Court has written the order which runs almost to 18 pages, except quoting certain decisions, the Trial Court has concluded by rejecting the prayer of the petitioner only on the ground that the petitioner/defendant No. 1 has not deposed that he would be coming as a witness and as a result of which the Court has not permitted him to adduce his evidence. This is absolutely erroneous and illegal view expressed by the Court resulting in the impugned order.

9. On re-appreciation of the material including the application, the objections of both sides and the law applicable, I am of the view that the Trial Court ought to have allowed the application of the petitioner as the submission made therein constituted "sufficient cause" under exception to Order 18 Rule (1) and (2) procedure.

10. In the result, the petition is allowed, the impugned order dated 5.2.2003 passed by the learned Addl. Civil Judge (Sr.Dn.), Gadag is set aside. I.A.VI filed by the petitioner/defendant No. 1 is allowed. The Trial Court is directed to examine the petitioner/ defendant No. 1 within one week from the date of receipt of the copy of this order or production of the same by either of the parties as well as cross-examine other witnesses.

11. In the facts and circumstances, there shall be no order as to costs.

12. The operative portion of the order be communicated to the Trial Court.