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(2017) 03 KAR CK 0204

In the Karnataka High Court

Case No : 14230 of 2016(GM-CPC)

Chikkamadaiah S/o late Minakegowda — APPELLANT

Vs

Smt. Ningamma W/o late Kivudegowda @ Madaiah — RESPONDENT

Date of Decision : 13-03-2017

Acts Referred:
Code of Civil Procedure, 1908, Section 151, Order 23Rule 1(3)(a) - Saving of Inherent powers of Court

Citation : (2017) 03 KAR CK 0204

Hon'ble Judges : B.Veerappa

Bench : SINGLE BENCH

Advocate : Somashekhar Kashimath, Rajeswara P.N.

Judgement

1. The present writ petition is filed by the first plaintiff against the order dated 6.2.2016 dismissing I.A.No.VII, filed by the plaintiffs under Order XXIII Rule 1(3)(a) r/w. Section 151 of Code of Civil Procedure in O.S.No.56/2014 on the file of the I Additional Civil Judge and JMFC., Malavalli.

2. The plaintiffs filed a suit in O.S.No.56/2014 for partition and separate possession in the suit schedule properties contending that the suit schedule properties are joint family properties of the plaintiffs and defendant; plaintiffs and the defendant are the members of the joint family and there was no partition in the family, etc. The defendant filed her written statement denying the entire plaint averments and contended that no cause of action arose at the time of filing of the suit. She further contended that the suit for partition is not maintainable and some of the properties are not included in the plaint schedule and therefore suit is to be dismissed, etc.

3. When the matter was posted for evidence, at that stage, plaintiffs filed I.A.No.VII under Order XXIII Rule 1(3)(a) r/w. Section 151 of CPC to withdraw the suit with liberty to file a fresh suit contending that while the

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plaintiffs came to know some mistakes occurred while filing the suit and contended that all are in joint possession, the plaintiffs'' father and his elder brother did not get khatha in their names and same has not been stated in the plaint which is a formal defect occurred in the plaint, etc. Therefore, they want to withdraw the present suit with liberty to file a fresh suit.

4. The defendant filed objections to the said application. The trial Court on considering the application and the objections, rejected the said application by the impugned order mainly on the ground that the Court has to be satisfied about the existence of the formal defect due to which the suit is likely to fail or other sufficient ground for compelling the plaintiffs to institute fresh suit. Hence, the present writ petition is filed.

5. I have heard the learned counsel for the parties to the lis.

6. Sri Somashekhar Kashimath, learned counsel for the petitioner-plaintiff contended that the impugned order passed by the trial Court rejecting I.A.No.VII filed under Order XXIII Rule 1(3)(a) r/w. Section 151 of CPC is erroneous and contrary to the material on record. He further contended that the trial Court dismissed the application mainly on the ground that if there are any formal defects, then the plaintiffs are at liberty to correct the same in the plaint by filing necessary application which is contrary to the provisions of Order XXIII Rule 1(3)(a) of CPC. In support of his contention, he has relied upon the judgment of the Hon''ble Supreme Court in the case of Baniram & others Vs. Gaind & others, reported in AIR 1982 SC 789.

7. Per contra, Sri Rajeswara P.N., learned counsel for the first respondent-defendant No.1 sought to justify the impugned order.

8. Having heard the learned counsel for the parties to the lis, the only point that arises for my consideration is: "Whether the trial Court is justified in rejecting I.A.No.VII filed under Order XXIII Rule 1(3)(a) r/w. Section 151 of Code of Civil Procedure under the facts and circumstances of present case?"

9. I have given my anxious consideration to the arguments advanced by the learned counsel for the parties. It is clear that the plaintiffs filed a suit for partition and separate possession in respect of the suit schedule properties contending that the suit schedule properties are joint family properties of the plaintiffs and the defendant. When the matter was posted for evidence, the plaintiffs filed I.A.No.VII under Order XXIII Rule 1(3)(a) of Code of Civil Procedure Code to withdraw the suit with liberty to file a fresh suit contending that there were some formal defects in filing the suit. The trial

Court considering the said application, recorded a finding that on perusal of the pleadings and documents on record, certain rights have been accrued to the defendant. Therefore, if the plaintiff intends to change some of the facts, he can make by way of amendment, but without correcting the mistakes in the plaint by way of amendment, the plaintiff cannot seek withdrawal of the plaint itself is not

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permissible.

10. The trial Court has failed to notice that at any stage of the suit, the plaintiff can file an application for withdrawal of the suit or abundan his suit where the Court is satisfied that a suit is filed with some formal defects and there are sufficient grounds for allowing the application to withdraw the suit and institute a fresh suit in respect of the subject matter of the claim or part of the claim. The trial Court has erred in holding that if there are formal defects, then the plaintiffs are at liberty

to correct any defects occurred in the plaint by filing amendment application.

11. The trial Court is not justified in dismissing the application for withdrawal of the suit. The impugned order passed by the trial Court is against the very intention of the Legislature while enacting the provisions of Order XXIII Rule 1(3)(a) of Code of Civil Procedure. Having considered the fact that non-pleading of a point may prove a technical impediment and may result in the dismissal of the suit which may impede a fresh suit, this Court is of the considered opinion that it is just and proper in the interest of justice to permit the plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action, subject to the payment of reasonable costs.

12. The Hon''ble Supreme Court while considering the provisions of Order XXIII Rule 1(3)(a) of CPC in Baniram''s Case (cited supra) has held as under:-

"We heard Mr.Phadke, learned counsel for the appellant for some time. After the discussion, at a certain stage, a contention was advanced by Mr.Phadke on a particular point, in the case and he conceded that it was not the case pleaded in the plaint. At this stage Mr.Phadke wishes to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action. Having considered the fact that non-pleading may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated, we consider it just and proper in the interests of justice to permit the appellant-plaintiff to

withdraw the suit with liberty to file a fresh suit as stated hereinabove. We accordingly grant the permission subject to the condition that the appellant shall pay Rs.1,000/- by way of costs in this Court within two months from today in addition to any costs paid already under the orders of the High Court."

13. For the reasons stated above, the point raised in the petition has to be held in the negative holding that the trial Court is not justified in dismissing the application filed by the plaintiffs.

14. In view of the aforesaid reasons, writ petition is allowed. Impugned order dated 6.2.2016 passed by the trial Court on I.A.No.VII filed under Order XXIII Rule 1(3)(a) of Code of Civil Procedure is quashed. I.A.No.VII filed under Order XXIII Rule 1(3)(a) of Code of Civil Procedure is allowed, subject to payment of costs of Rs.2,000/- (Rupees two thousand only) payable to the

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defendant with liberty to the plaintiffs to file fresh suit in accordance with law.

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