

(2007) 10 KAR CK 0005

In the Karnataka High Court

Case No : Civil Revision Petition No. 73 of 2006

Dr. Hemachandra Sagar and Dr. Premachandra Sagar

APPELLANT

Vs

Sri D. Prithviraj and Smt. Pramila Narayanswamy

RESPONDENT

Date of Decision : 29-10-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 33 Rule 3, 151

Citation : AIR 2008 Kar 634 : (2008) 1 KarLJ 166 : (2008) 1 KCCR 221

Hon'ble Judges : D.V. Shylendra Kumar, J

Bench : Single Bench

Advocate : Jayavittal Rao Kolar for B.L. Acharya, Venkataramana, HCGP, for the Appellant; M.C. Ravikumar, for R-1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

D.V. Shylendra Kumar, J.—This civil revision petition u/s 115 of CPC is directed against the order dated 4-1-2006 passed in P Misc No 726 of 1993, on the file of XV Additional City Civil 6s Sessions Judge, Bangalore City,

2. Under the impugned order, the leaned trial judge had permitted the plaintiffs-respondents to prosecute the suit filed by them as indigent persons. It is aggrieved by tills order, the defendants in the suit have filed tills civil revision petition.

3. Civil revision petition having been admitted and the respondents, who are beneficiaries of the impugned order, have entered appearance through counsel Sri M.C. Ravikumar.

4. I have heard Sri Jayavittal Rao Kolar learned senior counsel for petitioners, Sri M.C. Ravikumar, learned Counsel for the respondents and also Sri Venkataramana, learned Government Pleader on behalf of the state.

5. Submission of Sri Kolar senior counsel appearing for the petitioners is that the trial judge has committed a serious error in passing the impugned order; that the

trial judge has not adhered to the requirement of provisions of Order XXXIII Rule 1 to 3 of CPC; that the provision having been held to be mandatory and that aspect having not been kept in mind by the learned trial judge, the order impugned is vitiated. It is also urged that the trial judge has not bestowed his attention to the bona fides of the applicants/plaintiffs; that the plaintiffs had come up with such an application after prosecuting the suit otherwise and after 3 to 4 years after the institution of the suit only when it was pointed out that the plaintiffs have not paid proper court fee, they came up with a belated petition under the provisions of Order XXXIII Rule 1 of CPC. Further submission of the learned senior counsel is that though there were two plaintiffs, the second plaintiff, who came on record as legal heir of the deceased original first plaintiff Smt Kesari Bai, was not an indigent person, had means to pay the court fee if at all it is required to be paid and this aspect having not been examined by the learned trial judge, the order impugned is vitiated,

6. Per contra, Sri Ravikumar, learned Counsel for the respondents-plaintiffs submits that the very civil revision petition is not maintainable; that the proceedings is more an abuse of the process of the court; that the respondents who were plaintiffs in the suit have been waging a losing battle for getting their due share in the properties of late Dayananda Sagar ever since the year 1988, but the suit is not progressed much; that the respondents have been kept out of their legitimate entitlement by delaying tactics adopted by the petitioners/defendants; that the civil revision petition is not maintainable u/s 115 CPC, as the disposal of the P Misc 726 of 1993 even in favour of the revision petitioners would not have concluded the suit in their favour and the impugned order being one during the pendency of the suit, the proviso to Section 115 CPC is attracted and therefore the civil revision petition is liable to be dismissed.

7. The order leading to the above civil revision petition has a considerable history behind it. The undisputed facts are that: A suit had been originally filed by Smt Kesari Bai and Sri D Prithviraj claiming to be wife and son respectively of late R Dayananda Sagar and for a share in the properties of the late Dayananda Sagar, impleading the other two sons of late Dayananda Sagar through his another wife. The suit though filed in the year 1988 for partition on payment of a fixed court fee, as the defendants had taken the stand that the plaintiffs are nevertheless required to pay court fee under the provisions of Section 35 of the Karnataka Court. Fee and Suits Valuation Act, 1958 [for short, the Act], on the ground that the plaintiffs are not in joint possession of the suit schedule properties and as against such a stand, the trial court having held in favour of the defendants, the matter had been carried to this court in CRP No 1388 of 1993, which was rejected by this court and the plaintiff's have taken recourse to the proceedings of Order XXXIII Rule 1 of CPC by filing P Misc No 726 of 1993, It appears in the first round, the petition had been allowed, which was not to the liking of the defendants, who had carried the matter to this court with success and the plaintiffs having carried the matter further to the Supreme Court, the order in revision passed by this court having been set aside and the matter remanded to

the trial court for fresh enquiry on the P. Misc petition, the petition had been examined by allowing the parties to let in evidence and on appreciation of evidence etc., after hearing the parties, it has now been allowed by the trial court, which is impugned in this revision petition.

8. A perusal of the above undisputed developments does indicate that the matter had one reached the Supreme Court; and had been remanded to the trial court for the precise purpose of holding an enquiry on the prayer of the plaintiffs for permission to sue as indigent persons and the trial court having taken the view that the plaintiffs are indigent persons, they can now prosecute the suit as such, but the order permitting them to do so is no questioned.

9. Whether such an order assuming that it is in any way suffers from any infirmities as submitted by the learned senior counsel appearing for the petitioners or otherwise, I am of the view that such an order is only an order passed at the interlocutory stage of a suit filed by the plaintiffs seeking for partition of the suit schedule properties etc. Though it is vehemently urged by the learned senior counsel that a separate number having been assigned as P Misc 726 of 1993, independent enquiry having been held and the trial court having passed the impugned order, the proceedings should be construed as independent proceedings and therefore the legality of such order can be examined by this court within the scope of main provision of Section 115 CPC, I am of the view that a proceeding of this nature is an incidental proceeding in the pending suit. It is not an independent proceeding by itself, which can survive on its own. In fact the P Misc 726 of 1993 under Order XXXIII Rule 1 of CPC was filed only for the purpose of enabling the plaintiff to prosecute the suit as an indigent person and nothing more. What is examined by the court is only the capacity or otherwise of the persons praying for permission to sue the suit as indigent persons. The petition itself is in the context of the suit filed before the court and not an independent proceeding. If so, it is obvious that the order passed by the trial court is an order during the pendency of the suit and necessarily has to be taken as an interlocutory stage or as an interlocutory order.

10. If such is the nature of the order and is in a pending suit, I am of the view that the scope of examination of such order can only be in terms of Sub-section (1) of Section 115 CPC and not under the main part of Section 115, In so far as the examination under the proviso of Section 115 is concerned, the scope for interference by high court is only if the application should have been ordered in favour of the revision petitioner, it should have concluded the proceedings in the suit and not otherwise. In the present case, even if the application to sue as indigent persons should have been rejected, which is an order in favour of the revision petitioners, even then, the suit would not have come to an end, as in such an event, the plaintiffs will have to pay the court fee, but not dismissal of the suit.

11. It is for this reason, I hold that the revision petition filed u/s 115 CPC is not tenable and therefore there is no farther examination of the various contentions

urged by the learned Senior Counsel appearing for the petitioners on the merits of the revision petition. However, it is open to the petitioners, if so advised and if it becomes so necessary, to avail of the provisions of Section 105 CPC as and when the situation arises.

12. Without prejudice to such possibility, this civil revision petition is dismissed.