

(2015) 07 KAR CK 0370

In the Karnataka High Court

Case No : Writ Petition No. 100588 of 2015 [GM-CPC]

Gangawa and Others

APPELLANT

Vs

Chandrashekhar Sidram Galagali and Others

RESPONDENT

Date of Decision : 17-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3), 151

Citation : (2015) 07 KAR CK 0370

Hon'ble Judges : B. Veerappa, J

Bench : Single Bench

Advocate : Rekha Patil, Advocate for M.G. Naganuri, for the Appellant; K. Anandkumar, Advocates for the Respondent

Final Decision : Allowed

Judgement

B. Veerappa, J—The plaintiffs filed the above writ petition against the order dated 07.01.2015 on I.A. No. XXX made in OS No. 82/2008 filed under Order XXIII Rule 1(3) read with Section 151 of the Code of Civil Procedure, 1908 (for short "the CPC") allowing the application in part and permitted the plaintiffs to withdraw the suit, without giving liberty to file a fresh suit, on the same of cause of action.

2. The petitioners, who are the plaintiffs in the trial court, have filed this writ petition, stating that the original plaintiff Gangawwa had filed the suit for declaration to declare that the alleged sale deed dated 09.08.1995 in respect of the suit schedule properties made in favor of the defendants as null and void; consequently, for permanent injunction and contending that the suit schedule properties previously were in the name of original plaintiff's husband by name Basagouda Parappa Darur and the plaintiff is the only legal heir and as such, she inherited the entire suit property after the death of her husband, being the only legal heir and her name was entered in respect of the suit lands and the defendants have no right over the suit schedule properties and the sale deed obtained by the defendants dated 09.08.1995 is forged and fabricated and

obtained by impersonation of the plaintiff, etc.

3. The defendant filed written statement denying the entire plaint averments and contended that the plaintiff has executed the sale deed as alleged. Therefore, he sought for dismissal of the suit.

4. After completion of the evidence of the plaintiffs, the plaintiffs filed an application under Order XXIII Rule 1(3) read with Section 151 of the CPC to permit the plaintiffs to withdraw the suit with liberty to file a fresh suit on the same of cause of action, on the ground that there is a necessity to incorporate the averments regarding the Will dated 22.01.1990, by giving full particulars of the legatees, the properties involved, the state of mind of the testatrix, etc.

5. The said application was not at all contested by the defendants.

6. After hearing both the parties, the learned Senior Civil Judge & JMFC, by his impugned order, allowed the application in part, permitted the plaintiffs to withdraw the suit, without giving liberty to file a fresh suit on the same of cause of action. Therefore, the present writ petition is filed.

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

8. Smt. Rekha Patil for Sri. M.G. Naganuri, learned counsel for the petitioners, vehemently contended that when the plaintiffs filed an application under Order XXIII Rule 1(3) of CPC to withdraw the suit, with liberty to file a fresh suit, the trial court cannot split the provision and allow the plaintiffs to withdraw the suit and reject the prayer to file fresh suit on the same cause of action, which is contrary to the provisions of Order XXIII Rule 1(3) of the CPC and contrary to the dictum of this Court, as held in a catena of decisions, time and again. Therefore, she sought for setting aside the order passed by the trial court.

9. Per contra, learned counsel for the respondents/defendants sought to justify the impugned order and contended that the application filed by the plaintiffs is at a belated state and no sufficient ground is made out to permit them to file a fresh suit. Therefore, he sought to dismiss the petition.

10. The facts are not in dispute that the plaintiffs filed the suit for declaration and consequential relief of permanent injunction and after completion of the evidence, plaintiffs want to incorporate certain factual averments with regard to a Will dated 22.01.1990.

11. Admittedly, the said application was not opposed by the defendants by filing any objections. The trial court while passing the impugned order has observed that the plaintiffs may be permitted to withdraw the suit without reserving any rights to file fresh suit on the same cause of action and accordingly, passed the impugned order.

12. The trial court failed to notice the provisions of Order XXIII Rule 1(3) of the CPC. The object of the provisions makes it clear that at any time after, the institution of a suit, the plaintiff may as against all or any of the defendants

abandon his suit or abandon a part of his claim. Rule 1(3) states that, where the Court is satisfied that a suit must fail by reason of some formal defect, or 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.

13. While considering the provisions of Order XXIII Rule 1(3) of the CPC, the trial court cannot split the prayers of the plaintiffs into two parts. The relief claimed by the plaintiffs was composite relief, viz., withdrawal of the suit with liberty to file a fresh suit on the same of cause of action. The relief of the plaintiffs cannot be split it into two parts by the trial court. The trial court either has to allow the application in toto or reject it as a whole. The trial court has no jurisdiction to split up the reliefs into two parts, unless the plaintiffs give their consent to that effect and it is not the intention of the Legislature, while enacting the provisions of Order XXIII Rule 1 of the CPC, that the plaintiff should be put to this loss by breaking up of the prayer for withdrawal with permission to file a fresh suit in respect of the same subject-matter, into two parts. The impugned order passed by the trial court is erroneous and liable to be quashed.

14. Accordingly, the writ petition is allowed.

The impugned order passed by the trial court dated 07.01.2015 on I.A. No. XXX made in OS No. 82/2008 filed under Order XXIII Rule 1(3) read with Section 151 of the CPC, on the file of the Senior Civil Judge, & JMFC, Raibag, is quashed and the matter is remitted to the learned Senior Civil Judge, & JMFC, Raibag, with a direction to reconsider I.A. No. XXX and pass orders, in accordance with law, after hearing both parties, expeditiously.