
(2000) 02 KAR CK 0093

In the Karnataka High Court

Case No : Civil Revision Petition No. 3739 of 1996

Smt. Parvathamma

APPELLANT

Vs

Smt. Kamma and others

RESPONDENT

Date of Decision : 11-02-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, 107, 107 (2)

Citation : (2001) 1 CivCC 320 : (2000) 6 KarLJ 72 : (2000) 2 KCCR 1515 :
(2001) 2 RCR(Civil) 521

Hon'ble Judges : T.N. Vallinayagam, J

Bench : Single Bench

Advocate : Sri A. Sridhar Hiremath, for the Appellant; Sri C.N. Kamath, for the Respondent

Judgement

1. The 4th defendant in O.S. No. 16 of 1978 on the file of the Court of Civil Judge at Tiptur (originally filed as O.S. No. 1 of 1975) is questioning the order passed by the First Appellate Court, wherein the Appellate Court has permitted the plaintiff in the above suit to withdraw the above suit and dismissed the appeal as having become infructuous.

2. The suit was one for partition and separate possession of the plaintiff 1/3rd share which was dismissed by the Trial Court. An appeal appears to have been preferred by the plaintiff against the dismissal of the suit and while appeal was pending, he, the plaintiff filed I.A. No. 3 seeking permission to withdraw the suit with a liberty to file a fresh suit with regard to the same subject-matter. This application was allowed permitting the plaintiff/the 1st respondent herein to withdraw the suit with a liberty to file a fresh suit with regard to the same subject-matter. Questioning such order, the C.R.P. in C.R.P. No. 2101 of 1985 was filed before this Court and that C.R.P. was allowed setting aside the order and remanded the case for First Appellate Court with a direction to dispose of the case afresh by giving opportunities to both parties and to dispose of the same on merits. After remand on 24-6-1987 by this Court, the Additional District Judge,

Tumkur, passed an order, wherein he has held that the earlier order passed on I.A. No. 3 was set aside by the High Court. Therefore, I.A. No. 3 was to be disposed of afresh. Consequently, the said I.A. No. 3 was taken up for fresh hearing. The Appellate Court has considered the affidavit filed by the son of the appellant that he be permitted to produce the additional documentary evidence including the application made by the respondent for making the katha in the name of the appellant. It was also alleged that in view of fresh documents filed, wherein, the appellant was shown as joint kathadar of the property, fresh opportunity has to be given to the respondent in the appeal and it requires further evidence, the permission to file fresh suit in the matter asked for.

3. 4th respondent therein, the 2nd defendant (3rd respondent herein) objected to such withdrawal on the ground that there is no formal defect or any sufficient grounds are made" out for granting such a prayer. The learned Judge, taking into consideration the provisions of Section 107(2) of the CPC and also Order 23, Rule 1 of the CPC held that the application is maintainable. The learned Appellate Judge considered the decisions in B.H. Radhakrishna v Guruvanna, Ammini Kutty and Others Vs. George Abraham, , Suraj Pal Singh Vs. Sri Gharam Singh and Others, and Masood Sab v Doddanna and Others and allowed the said application. It is this order that is challenged in the above civil revision petition.

4. It is contended that the order in question without setting aside the judgment decree in O.S. No. 16 of 1978 is wrong. Certain rights become vested in the defendants inasmuch as the findings on the parties will operates as res judicata if any new suit is filed. Ex. D. 3 was not considered wherein, it is found that the grandfather of the plaintiff died prior to 1955. The evidence of P.Ws. 3 and 4 were also not considered. There was no formal defects and the inabilities of the plaintiff to produce the records as additional evidence is not a ground for granting permission. The order of the District Judge is not sustainable.

5. Heard the respective Counsel.

6. A perusal of the order passed by the Trial Court show that a permission to withdraw the suit alone was granted and I.A. No. 3 was allowed. There is no difficulty to appreciate the position. Section 107, the powers of the Appellate Court has been specified. Section 107(2) which reads as follows.--

"Civil Procedure Code, Order 23, Rule 1, Section 107(2). Withdrawal of suit.-- Permission for, can be granted by Appellate Court also, as appeal is continuation of the suit".

The above provision clearly confers the power on the Appellate Court that can be imposed by the Court on original jurisdiction. Therefore, the exercise of the power by the Appellate Court u/s 107(2) is perfectly in order and there is no illegality can flow out of such exercise of power. In fact such exercise of power was the subject-matter of the decision in B.H. Radhakrishna's case, supra, wherein it was held that "the Appellate Court, can in proper cases, grant permission to withdraw the suit with liberty to bring a fresh suit. But that power

has to be used sparingly and cautiously". Then, in Suraj Pal Singh's case, supra, Allahabad High Court has held "withdrawal of suit at appellate stage - permissible" and there is no illegality in granting of such permission. In Ammini Kutty's case, supra, the Kerala High Court has upheld the permission granted by the Appellate Court u/s 107(2) holding that the appeal is continuation of the suit. In Massod Sab's case, supra, the following dictum has been laid down.--

"CPC, Order 23, Rule 1. Plaintiff seeking withdrawal of suit with liberty to file a fresh suit after 9 years on the ground that cause of action was yet to arise - Whether the Trial Court was justified in granting permission to withdraw suit.

But the delay in seeking withdrawal of the suit is not a ground to refuse the withdrawal because the ultimate aim of the Court is to see substantial justice is rendered even if some inconvenience is caused. Hence the order of the Trial Court permitting the legal representatives of plaintiff to institute a fresh suit is a just one. There is no ground to interfere with the order impugned".

Therefore, the appeal being a proceeding in continuation of the original suit, it can be safely concluded that the First Appellate Court is vested with a similar power as of the Court of original jurisdiction. Even taking into consideration the nature of the suit, which is now sought to be withdrawn, it is one for partition and there is no bar in seeking reopening of the partition even after the decree or to file subsequent suit for partition if it is found that there is no equitable partition made in the earlier case. Therefore, it cannot be said that it is not a proper case so as to not to permit the plaintiff to withdraw the suit with a liberty to file a fresh suit with regard to the same subject-matter.

7. Consequently, I find that the order permitting the withdrawal of the suit with a liberty to file a fresh suit on the same subject-matter is proper, just, reasonable and fair. No interference is called for and there is no merit in the C.R.P. Consequently, the C.R.P. is dismissed. No costs.