

(2009) 12 KAR CK 0012
In the Karnataka High Court
Case No : Writ Petition No. 3444 of 2008

Smt. Y. Lokeshwari

APPELLANT

Vs

Sri. Rajanna

RESPONDENT

Date of Decision : 18-12-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2010) 1 KCCR 487

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : V.B. Siddaramaiah, for the Appellant; A.V. Gangadharappa, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—Heard the Counsel for the petitioner and the respondent.

2. The petitioner herein is the plaintiff in a pending civil Suit in O.S. No. 401/2005. The suit schedule property described therein is as follows:

Property bearing Khata No. 414C/424, Site No. 414C measuring East to West by 25 feet and North to South by 30 feet situated at Ward No. 2, Aralimaradapalya, Sira Gate. Tumkur Town, bounded by:

East : Vacant site West : Site No. 414B North: Road South: Site No. 413B

The respondent herein has also filed a civil suit which is earlier in point of time in O.S. No. 378/2005 in respect of property which is described in the schedule thereto as follows:

Land bearing Survey No. 198/1A2 measuring 0-28 guntas situated at. Tumkur Village, Kasaba Hobli, Tumkur Taluk, which is converted and alienated for residential purpose, bounded by:

East : Land of M. H. Hanumantharayappa & Sons West : Property of the C.M.C.

North: Property of the C.M.C. South: Property of the C.M.C.

The respondent having filed an application u/s 10 of the Code of Civil Procedure, 1908, seeking stay of further proceedings in the civil suit filed by the petitioner, the Trial Court has come to a conclusion that the parties are one and the same, the issues that arise for consideration would be one and the same and the properties identified in the suit schedule are one and the same and therefore, the suit in O.S. 401/2005 ought to be stayed. It is this which is under challenge.

3. The Counsel for the petitioner would point out that the schedule to the two suits would indicate that the properties are not identical. The property described in schedule to the suit by the respondent measures 28 guntas. The property described in the schedule to the suit filed by the petitioner measures 25 feet x 30 feet. This, on the face of it, would indicate that the properties are not one and the same and insofar as the identity of the property is concerned, the property is described by its khata number and site number, whereas the property in the suit filed by the respondent is described by survey number. This, on the face of it, would indicate that the properties are not one and the same. Therefore, the Trial Court was not justified in holding that Section 10 stood attracted and in staying the proceedings in the suit filed by the petitioner.

4. The Counsel for the respondent, on the other hand, would submit that this is a finding of fact by the Trial Court and the fact of the matter is that the suit property shown in the schedule to the suit filed by the petitioner is described by khata number and site number and it forms part and parcel of the land described in the suit filed by him and since the suit filed by the respondent is earlier in point of time and since the land encompasses the land which is shown by survey number by the petitioner, the trial court has rightly held that a decision in the suit filed by the respondent would equally apply in respect of the property described in the suit schedule of the petitioner. The Counsel would draw attention to the language of Section 10 to emphasize that the Trial Court was not in error in holding that the properties are one and the same and in staying further proceedings in the suit filed by the petitioner. He would also highlight that the land has been converted and has been formed into sites. It is one of these sites in respect of which the petitioner has filed a suit. The entire land, however, on which the site is formed belongs to the respondent and it is this which is in issue. Hence, the Counsel would submit that there is no infirmity in the order.

5. By way of reply, the Counsel for the petitioner would point out that there was no material for the Trial Court to have arrived at a finding of fact at a pre-trial stage and what could have been decided by clubbing two suits and permitting the parties to tender evidence in respective claims has been forestalled and foreclosed by the Trial Court in arriving at a finding that the suit property of the petitioner falls within the suit property described by the respondent in his suit. This has resulted in gross miscarriage of justice and the two suits, on the other hand, could have been conveniently tried together, even if it could be assumed that the suit property of the petitioner falls within the suit property of the

respondent.

6. On these above contentions, the language of Section 10 which is extracted herein for ready reference reads as follows:

10. Stay of suit: No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title where such suit is pending in the same or any other Court in (India) having jurisdiction to grant the relief claimed, or in any Court beyond the limits of (India) established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation: The pendency of a suit in a foreign Court does not preclude the Courts in (India) from trying a suit founded on the same cause of action.

7. The fundamental test to attract Section 10 is, from a reading of the same, is whether on a final decision being reached in the previous suit, such decision would operate as *res judicata* in the subsequent suit. It applies only in cases where the whole of the subject matter in both the suits is identical. The key words in the Section are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contra-distinction to the words "incidentally or collaterally in issue", Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject matter in both the proceedings is identical. This is as laid down by the Supreme Court in *National Institute of Mental Health and Neuro Sciences Vs. C. Parameshwara*, Applying the above ratio and from a reading of the language of Section 10, it cannot be said that the Trial Court could have arrived at a finding that the suit property of the petitioner was encompassed by the land described in the suit schedule of the respondent's suit. This is a primary error committed by the Trial Court in holding that the suit property of the petitioner was within the suit property of the respondent. This was an issue which had to be agitated and in the absence of any material to demonstrate on the face of it, that the suit property of the petitioner was part and parcel of the land described by the respondent in his suit, the trial court having arrived at such a finding holding that Section 10 was attracted is erroneous. Hence, it is more appropriate if the two suits are clubbed and the parties are permitted to tender evidence in common in these suits even if it could be said that the suit property of the petitioner falls within the land of the respondent.

Accordingly, the writ petition is allowed. Annexure-A is quashed. The Trial Court is directed to proceed with the suit in terms of the above order.