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Court : Karnataka Gulbarga

Decided On : Oct-18-2012

Judge : B.S. Patil

Appeal No. : W.P.No. 85912 of 2012 (GM-CPC)

Appellant : Somashekar

Respondent : Srishail and Another

Judgement :

(Prayer: This Writ Petition is filed under Articles 226 and 227 of the Constitution of India, praying to set aside the order Dtd. 25.9.12 Annexure-M passed by the Court of the I Addl. Senior Civil Judge, Bijapur in O.S. No.178/2006 on I.A. No.37 and allow the same and etc.)

1. Application filed by the petitioner under Section 10 read with Section 11 and Section 151 of the Code of Civil Procedure (for short 'CPC') seeking stay of the proceedings in O.S. No.178/2006 having been dismissed vide order dated 25.09.2012 by the I Additional Senior Civil Judge, Bijapur, petitioner who is the 1st defendant in the suit has filed this petition.

2. Petitioner herein is the 1st defendant in O.S. No.178/2006 filed by the 1st respondent herein seeking a decree for specific performance of the contract dated 06.04.1998 whereunder, the petitioner is stated to have agreed to sell the property in question in favour of the plaintiff/respondent No.1. The suit is filed seeking a

direction to defendant No.1 to execute a registered sale deed in respect of the suit land with a further direction to the 2nd defendant/respondent No.2 herein to join him in execution and registration of the sale deed. This suit for specific performance came to be instituted on 13.06.2006. The present petitioner has resisted the suit. The trial of the suit is completed and the matter is at the stage of conclusion of the arguments. At this stage, the 1st defendant filed I.A. No.37 with the following prayer: "For the reasons contained in the accompanying affidavit, the applicant/1st defendant prays that, this Hon'ble Court may be pleased to stay further proceedings in the above suit pending disposal of RFA No.6012/2012 filed by the applicant before the High Court of Karnataka - Circuit Bench at Gulbarga, against the judgment dated 05-12-2011, passed by this Hon'ble Court in O.S. No.88/2007, in the interest of justice and equity."

3. It is necessary to notice here that O.S. No.88/2007, which had been instituted on 06.03.2007 subsequent to the suit O.S. No.178/2006, is filed by the brothers of the 1st defendant for partition and separate possession of the joint family properties including the property, which is the subject matter of the suit for specific performance. The 1st respondent/plaintiff in the present suit had got himself impleaded as 11th defendant in O.S. No.88/2007 and at his instance, an issue is framed at additional issue No.1 which is re-cast to read as, "Whether defendant No.11 proves that he is having interest over suit properties?"

On the said issue, a finding has been recorded holding that defendant No.1 had interest in one of the suit properties, which was the subject matter of the agreement of sale and further that W.P.85912/2012 the very suit O.S. No.88/2007 filed by the brothers of the petitioner herein has been partly decreed excluding the suit schedule property (subject matter of the agreement of sale). The 1st defendant/petitioner herein has preferred a Regular First Appeal before this Court in RFA No.6012/2012 which is pending consideration, wherein an interim order of stay of the judgment challenged has been granted. In this background, he requested the Trial Court not to proceed with the case in O.S. No.178/2006 and to await the decision to be rendered by this Court in the Regular First Appeal filed by the 1st defendant/petitioner herein.

4. The Trial Court has dismissed this application holding that no valid grounds had been made out by the petitioner/defendant No.1 for stay of the suit in terms of the provisions contained under Section 10 CPC.

5. Learned Senior Counsel Sri. S.M. Chandrashekhar appearing for the writ petitioner contends that though the suit O.S. No.178/2006 filed for specific performance of the agreement of sale is earlier in point of time, as the suit for partition instituted in O.S. No.88/2007 has been subsequently disposed of and the issue regarding the right of the 1st defendant over the suit schedule property in O.S. No.178/2006 has been answered, the said finding has a direct bearing on the dispute raised in O.S. No.178/2006. It is further submitted that as long as the finding on additional issue No.1 in O.S. No.88/2007 is the subject matter of appeal in RFA No.6012/2012, it is just and necessary that further proceedings in O.S. No.178/2006 are stayed. He invites the attention of the Court to Sections 10 and 11 CPC, particularly, the explanation appended to Section 11 CPC to contend that the expression "previously instituted suit" contained in Section 10 has to be understood keeping in mind the meaning to be attached to a former suit as explained in explanation I to Section 11 CPC. He submits that keeping in mind the object behind both these provisions (Sections 10 and 11 CPC) and the desired effect that the Legislature intends to achieve, the meaning assigned to the expression "former suit" in explanation I of Section 11 to denote a suit which has been decided prior to the suit in question, whether or not instituted prior thereto has to be imported into Section 10 CPC, while understanding the meaning of the expression "previously instituted suit" for the purpose of stay of the suit as provided in Section 10 CPC.

6. This contention is strongly refuted by Sri. Ameet Kumar Deshpande, learned counsel appearing for the plaintiff/1st respondent. He has placed reliance on the judgment of the HIGH COURT OF HIMACHAL PRADESH rendered in the case of RANJU RAM AND ANOTHER v. NAND LAL AND OTHERS [2012 (1) CIVIL LJ 474].

7. Upon hearing the learned counsel for the parties and on careful perusal of the provisions on which reliance is placed by the learned Senior Counsel for the

petitioner and in the facts and circumstances of the present case, I am of the considered view that such an interpretation of Section 10 CPC with regard to the expression "previously instituted suit" cannot be accepted. It is useful to refer to the provisions contained under Section 10 CPC at this stage, which reads as under:

"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.]"

8. A perusal of the provision makes it very clear that there is a bar for any Court to proceed with the trial of any suit, if the matter W.P.85912/2012 in issue in that suit was directly and substantially in issue in a previously instituted suit between the same parties, or between the parties under whom they claim. There is an explanation appended to Section 10 CPC, which explains that 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. The Legislature has advisedly not explained the meaning of the expression "previously instituted suit" to include a latter suit which has been already disposed of as is the case in respect of Section 11 CPC, which deals with the principles of Res judicata. It is useful to refer to Section 11 and explanation I appended thereto, which reads as under:

"11. Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

Explanation I.- The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

9. The purpose and object of both the provisions are different. In the case of Section 10 CPC, a provision is made for stay of the proceedings. Whereas, in the case of Section 11 CPC, there is a bar enacted for trying the suit.

10. In the instant case, the suit which is sought to be stayed has been instituted seeking the relief of specific performance based on an agreement of sale and the principal question in issue pertains to the due execution of the agreement and the obligation of the 1st defendant to execute the registered sale deed.

11. In the subsequent suit, which is instituted by the brothers of the present petitioner seeking partition, an incidental question has been raised regarding the exclusive rights of the present petitioner over one item of the property, which he has allegedly agreed to sell to the 1st respondent herein by executing the suit agreement.

12. While decreeing the suit for partition filed by the brothers of the present petitioner, the Trial Court has observed that as regards the suit item, it was the 1st defendant, who was the absolute owner of the property. The 1st defendant/petitioner herein has challenged the Judgment and Decree and has challenged the finding regarding the absolute ownership. The matter is pending consideration before this Court in the Regular First Appeal.

13. It is thus, clear that as per Section 10 CPC, if the issue involved in the subsequent suit was also directly and substantially involved as an issue in the previously instituted suit between the same parties, then the Court shall not proceed with the trial of such subsequent suit. The obvious purpose beyond Section 10 CPC seems to be that if a matter has been already decided by a Court, the precious time of the Court and of the parties should not be wasted in the second suit by conducting a second trial and that the parties in such circumstances should await the judgment of the previously instituted suit. In the present case, both the suits have been proceeded with. The brothers of the petitioners have instituted the second suit seeking partition. They are before this Court in the appeal filed by them. The trial in the former suit is completed and the arguments have commenced. They cannot now take advantage of the disposal of the suit for partition filed by the brothers of the petitioner to ask for stay of the

previously instituted suit. The present suit is a suit instituted earlier, based on a totally different cause of action seeking decree for specific performance. The proceedings are at the stage of conclusion inasmuch as arguments of the parties have been partly heard as stated at the Bar. At this stage, defendant No.1/petitioner herein has come up with an application to stay the proceedings. Merely because one of the issues answered in the latter suit has some bearing on the issue raised in the present suit, this Court cannot expand the scope of Section 10 CPC by importing the explanation appended to Section 11 CPC with regard to the meaning to be attached to the expression 'former suit'. If the Legislature had intended the same, it would have certainly said so in Section 10 CPC itself by appending an explanation to that effect. The fact that such an explanation is found in Section 11 CPC and the same is conspicuously absent in Section 10 CPC, itself clearly shows the intention of the Legislature that stay of suit cannot be resorted to in such contingency. Even otherwise, in the present case, as the proceedings have already crossed the stage of trial and reached the stage of conclusion of the arguments, it is not in the ends of justice to stay the proceedings merely on the ground that an appeal filed before this Court is pending in connection with a partition suit between the brothers.

14. Counsel for the 1st respondent is right and justified in placing reliance on the judgment of the High Court of Himachal Pradesh in the case of RANJU RAM AND ANOTHER referred to supra as regards stay of the suit U/S. 10 CPC.

15. Hence, the writ petition being devoid of merit is dismissed.

16. In view of the dismissal of the main petition itself, I.A.No.1/2012 filed for vacating the interim order of stay granted on 10.10.2012 does not survive for consideration and the same is also dismissed.

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