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Court : Mumbai Aurangabad

Decided On : Mar-14-2014

Judge : T.V. Nalawade

Appeal No. : Civil Revision Application No. 253 of 2013

Appellant : Raosaheb and Others

Respondent : Vinod and Others

Judgement :

1) This revision application is filed against the order made on Exhibit 51 in Regular Civil Suit No.125 of 2008 by the Joint Civil Judge, Junior Division, Ausa. The application filed under Order XXIII Rule 1 of the Code of Civil Procedure for permission to withdraw the suit is allowed by the trial Court subject to payment of cost of Rs. 5000/-. Both the sides are heard.

2) Regular Civil Suit No.125 of 2008 was filed for relief of partition and possession of ancestral and joint family property. It is the case of the plaintiffs that marriage between their mother and defendant No.1 Raosaheb had taken place in the year 1970. It is contended that Raosaheb married with defendant No.2 when his first marriage was subsisting. It is contended that defendant Nos.3 and 4 and a daughter are born to defendant No.2 from Raosaheb but they cannot be called as legitimate children. It is contended that to deprive the plaintiffs of the suit property, the defendant Nos.1 and 2 joined their hands and they created false record of

maintenance proceeding and by using the order they created charge on the joint family property. It is contended that the suit was collusive in nature and so the decision is not binding on the plaintiffs. It is contended that to defeat the claim of the plaintiffs in respect of the suit property some portion of the suit property was sold to defendant No.5 by defendant No.1 but that transaction is also sham and bogus and it is not binding on the plaintiffs. The plaintiffs had claimed two-third share in the suit property.

3) Defendant Nos.1 to 4 filed written statement together to contest the suit. They denied that mother of the plaintiffs had married with defendant No.1. It is their contention that marriage between defendant Nos.1 and 2 took place in the year 1970 and after that defendant No.1 had come in contact with mother of the plaintiffs. It is contended that no marriage was performed with the mother of the plaintiff by defendant No.1.

4) In the application at Exhibit 51 filed for permission to withdraw the suit, the plaintiffs contended that due to denial of relationship it has become necessary for them to make their mother party to the proceeding and give particulars and clarification with regard to the relationship. It was also contended that, some suit properties were transferred by defendant No.1 to third parties and it was necessary to make them also party to the proceeding. They contended that it was necessary join sister of defendant No.3 also to the suit in view of the nature of dispute created in the written statement.

5) The application at Exhibit 51 was opposed by the defendant Nos.1 to 4 by contending that the defect is not of formal nature. It is contended that the defect goes to the root of the matter and so permission cannot be granted.

6) Learned Judge of the trial Court has held that the defect is of formal nature and in the interest of justice such permission needs to be given. It is observed that no prejudice will be caused to the defendants by granting such permission. Further to compensate loss, cost of Rs. 5000/- is awarded in favour of defendant No.1.

7) Learned counsel for the applicants has placed reliance on the case reported as **2006(2) Mh.L.J. 693 (Rajaram Jairam Raut v. Baliram Laxman Raut)**. The facts

of this reported case show that the Court formed opinion that only by making amendment the defects could have been cured and it was not necessary to grant permission to withdraw the suit. The facts of the present case are altogether different.

8) The provision of Order 23 Rule 1(3) runs as under:-

œ**1. Withdrawal of suit or abandonment of part of claim:**-

(3) Where the Court is satisfied :

(a) that a suit must fail by reason of some formal efect, or

(b) 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.?

9) There are two pars, (a) and (b), which are apparently separate from each other. The provision shows that grant of leave under this provision is within discretion of the Court. While exercising the discretion the Court is expected to see that the conditions laid down in either part of the provision viz. (a) and (b) are satisfied if the matter falls under one of the two grounds. The object behind the provision is to see that due to technical defect justice is not denied. However, the Court is also expected to see that the other side is not unnecessarily harassed.

10) The formal defect referred to in the aforesaid provision is such defect that it is not affected the merits of the case. The plaintiffs have come with the case that the marriage between their mother and defendant No.1 was solemnized in the year 1970 and it was subsequently dissolved in proceeding filed by their mother. In view of this contention they have not made their mother party to the suit. The fact that in a proceeding filed by their mother, the marriage was dissolved cannot be disputed but in view of the contention that the defendant No.2 married with defendant No.1 in the year 1970 and due to the contention that there was no marriage between mother of the plaintiffs and defendant No.1 it becomes

necessary to frame the issue in that regard. In that case the mother needs to join as a party to the suit. However, from the plaint itself it can be said that non inclusion of the mother was not fatal to the suit. The term œsufficient ground? used in second part of the provision needs to be liberally interpreted. It is also observed that the discretion given by the provision needs to be used for the ends of justice. When such discretion is used by giving reasons, the court exercising revisional power is not expected to interfere in the order of the trial Court. The order cannot be celled as illegal or improper. This Court holds that there is no reason to interfere in the order made by the trial Court.

11) In the result, the civil revision application stands dismissed.

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