

Mahadevi Vs. Mallikarjun and Others

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Court : Karnataka Kalaburagi

Decided On : Jul-20-2016

Judge : Anand Byrareddy & L. Narayana Swamy

Appeal No. : Regular First Appeal No. 6054 of 2013

Appellant : Mahadevi

Respondent : Mallikarjun and Others

Judgement :

(Prayer: This RFA is filed against the order dated 04.09.2013 passed in O.S. No. 294/2002 on IA No. 19 pending on the file of the III Addl. Senior Civil Judge at Gulbarga, allowing the I.A.No. 19 filed by the applicant/plaintiff u/o 23 Rule 1 of CPC and the plaintiff is hereby permitted to withdraw the suit.)

Anand Byrareddy, J.

1. Heard the learned counsel for the appellant and learned counsel for the respondents. The appellant was defendant No.3 in a suit for partition filed by the Respondent No.1. The respondent No.2 was the head of the family and appellant was his daughter.

2. During pendency of the partition suit, the first respondent, it is alleged by the appellant, had in collusion with the other respondents sought to withdraw the suit

in order to defeat the rights of the present appellant, and without determining and ignoring the counter claim of the appellant and without allowing transposition of the appellant as plaintiff in the above suit, the trial court had allowed withdrawal of the suit and therefore aggrieved by the same, the present appeal is filed.

3. The learned counsel would submit that the law on the point is no longer res integra and it has been held by a Division Bench of this court in, Gowramma vs., Nanjappa, ILR 2001 KAR 4853, as to the procedure that was required to be followed by the trial court in such a situation, and whether the trial court could have allowed the application, IA No.19, filed by the plaintiff under Order XXIII Rule 1 of the Code of Civil Procedure, 1908, (hereinafter referred to as the CPC , for brevity) ignoring the plight of the present appellant, is the only question to be decided.

4. The learned counsel for the respondent No.1(A) on the other hand would submit that there is no bar for the appellant to pursue an independent remedy of filing a fresh suit for partition and this liberty has been granted by the trial court itself. Hence the appellant cannot be said to be aggrieved and even now she is entitled to file a suit for partition and in that view of the matter, there is no error committed by the trial court and seeks to justify the impugned judgment.

5. However, the judgment referred to herein above lays down the procedure to be followed in cases such as this. The facts of that case were almost similar to the present case on hand and the Division Bench while referring to the decision in the case of Jagmohan v. Dera Radha Swami Satsang, AIR 1996 SC 2222, has noticed that the Supreme Court has laid down that a counter claim is no longer confined to money claims or to a cause of action of the same nature as an original action of the plaintiff and that this court in State Trading Corporation of India Ltd., v. Vanivilas Co-operative Society Ltd., 2001(5) Kant. LJ 570, has held that a counter claim need not be restricted to money suits only. Therefore, it was held that whether a claim for a share by a defendant in a partition suit, is a counter claim was not the issue. The question was, whether the defendant seeking a share is also in the position of a plaintiff and whether the original plaintiff cannot therefore withdraw the suit without the consent of the defendant who is in the position of the plaintiff. After noticing the judgment of other high courts namely,

Tukaram Mahadu Tandel v. Ramchandra Mahadu Tandel, AIR 1925 Bom. 425, R Ramamurthi v. Rajeshwara Rao, AIR 1973 SC 643, Ajita Debi v. Hossenara Begum, AIR 1977 Calcutta 59, wherein it was held that where an application has been made under Order XXIII Rule 1 C.P.C, the plaintiff is entitled to withdraw the suit and defendants cannot be heard to oppose such a prayer but the said legal right of the plaintiff, to withdraw the suit, is not unconditional. The court can only exercise its power in favour of the plaintiff where the defendant's right is not adversely affected if the plaintiff is allowed to withdraw the suit. The sole plaintiff normally cannot be allowed to withdraw the suit. The defendant may be allowed to be transposed as plaintiff in the suit. And that the above principle was followed and reiterated in the case of Pattabhiramayya v. B. Gopalakrishnayya, AIR 1986 Andhra Pradesh 270, while placing reliance on the decision of the Supreme Court in the case of Hulas Rai v. K.B. Bass and Co., AIR 1968 SC 111. It was laid down that the procedure to be followed by courts in a partition suit when the plaintiffs want to withdraw the suit or when the plaintiff wants the suit to be dismissed as settled out of court with some defendants as compromised, as follows:

8. THE procedure to be adopted by Courts in a partition suit, when a plaintiff wants to withdraw the suit, or when plaintiff wants the suit to be dismissed as settled out of Court with some defendants, can be summarised thus:

(i) When a plaintiff wants a partition suit to be dismissed or withdrawn as settled out of Court, the Court should require notice of such application or memo to all other parties (not only all defendants, but co-plaintiffs if any) and hear the parties.

(ii) If all parties are agreeable for the dismissal or withdrawal, the Court may grant the request.

(iii) If any defendant has already sought partition and separate possession by paying Court Fee and opposes the dismissal/withdrawal, it shall permit such defendant to transpose himself/herself as plaintiff and continue the suit, irrespective of whether he makes an application for transposition or not.

(iv) Even if no defendant has sought the relief of partition and separate possession, till then, the Court may in appropriate cases permit any defendant

who files an application in that behalf, to get himself transposed as plaintiff and claim petition and separate possession by paying necessary Court Fee and continue the suit. Refusal to grant such permission should be for valid reasons to be assigned by the Court.

6. In the above view of the matter, though the trial court has reserved liberty to the appellant to file a fresh suit, the procedure as laid down by this court is the appropriate procedure, to be followed and hence the matter is remanded to enable the appellant to be transposed as plaintiff, and to adjudicate the suit in accordance with law. Hence the trial court shall take appropriate steps to issue notice to the other parties after the appellant is permitted to transpose himself as plaintiff and the proceeding shall go on in accordance with law. The impugned judgment is set aside.

The appeal is accordingly disposed of.

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