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Syed Abdul Bari And Ors Vs. Syed Imran And Ors

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Court : Karnataka Kalaburagi

Decided On : Dec-09-2021

Judge : M.G.S.Kamal

Appeal No. : CRP 200003/2021

Appellant : Syed Abdul Bari And Ors

Respondent : Syed Imran And Ors

Advocate for Pet/Ap. : Sri. D. P. Ambekar

Judgement :

1 R IN THE HIGH COURT OF KARNATAKA KALABURAGI BENCH DATED THIS THE09h DAY OF DECEMBER, 2021 BEFORE THE HONBLE MR.JUSTICE M.G.S.KAMAL CRP.NO.200003/2021 BETWEEN:

1. SYED ABDUL BARI S/O SYED WAJID KHAMAR, AGE:

52. YEARS, OCC: AGRICULTURE, R/O: H.NO.13-131, BIBI GALLI, HUMNABAD, BIDAR-585330.

2. SYED ABDUL BASITH OMER S/O SYED WAJID KHAMAR, AGE:

54. YEARS, OCC: AGRICULTURE, R/O: H.NO.13-131, BIBI GALLI, HUMNABAD, BIDAR-585330.

3. SYED ABDUL WAHAB ZEESHAN S/O SYED WAJID KHAMAR, AGE:

28. YEARS, OCC: BUSINESS, R/O: H.NO.13-131, BIBI GALLI, HUMNABAD, BIDAR-585330. ... PETITIONERS (BY SRI.D.P.AMBEKAR, ADVOCATE) AND:

1. SYED IMRAN S/O SYED MAISLIUDDIN, AGE:

32. YEARS, OCC: AGRICULTURE, R/O: NANDGAON VILLAGE, TQ. HUMNABAD, DIST. BIDAR-585330. 2

2. SYED MAISLIUDDIN S/O OSMANSAB, AGE:

67. YEARS, OCC: AGRICULTURE, R/O: NANDGAON VILLAGE, TQ. HUMNABAD, DIST. BIDAR-585330.

3. THE CHIEF OFFICER, TMC, HUMNABAD, DIST. BIDAR-585330.

4. VASANT S/O CHANDRAPPA PATIL, AGE:

55. YEARS, OCC: AGRICULTURE, R/O: SHIVAPUR GALLI, HUMNABAD, DIST: BIDAR-585330.

5. MALLAPPA S/O SHARANAPPA, AGE:

44. YEARS, OCC: AGRICULTURE, R/O: SHIVAPUR GALLI, HUMNABAD, DIST. BIDAR-585330.

6. LINGRAJ S/O BASAVARAJ, AGE:

48. YEARS, OCC: AGRICULTURE, R/O: SHIVAPUR GALLI, HUMNABAD, DIST. BIDAR-585330.

7. RAJAPA S/O GUNDAPPA, AGE:

47. YEARS, OCC: AGRICULTURE, R/O: SHIVAPUR GALLI, HUMNABAD, DIST. BIDAR-585330.

8. M.A.SAMAD S/O M.A.BASID, AGE:

57. YEARS, OCC: AGRI. & BUSINESS, R/O: P & T QUARTERS, HUMNABAD, DIST. BIDAR-585330.

9. SHIVAKANTA W/O JAGANATH, AGE:

38. YEARS, OCC: HOUSEHOLD & AGRICULTURE, R/O :OPP. KEB, HUMNABAD, DIST. BIDAR-585330. 3

10. SYED TAHER ALI S/O SYED AZAM ALI, AGE:

51. YEARS, OCC: AGRICULTURE, R/O: NANDGAON VILLAGE, TQ. HUMNABAD, DIST. BIDAR-585330. ... RESPONDENTS (BY SRI.AMEET KUMAR DESHPANDE, ADV., FOR R1 & R2; NOTICE TO R4 TO R7 & R9 DISPENSED WITH V/O DATED0410.2021; R8 & R10 ARE SERVED) THIS CRP IS FILED UNDER SECTION115OF THE CODE OF CIVIL PROCEDURE PRAYING TO CALL FOR RECORDS IN O.S.NO.17/2019 ON THE FILE OF THE PRINCIPAL CIVIL JUDGE & JMFC AT HUMNABAD, SET ASIDE THE

ORDER
DATED0911.2020 VIDE ANNEXURE-B, WHEREIN THE LEARNED TRIAL JUDGE HAS DISMISSED THE SUIT OF THE PLAINTIFFS AND RESTORE THE SUIT TO ITS ORIGINAL FILE AND NUMBER BY ALLOWING THIS REVISION PETITION. THIS PETITION BEING HEARD AND RESERVED FOR

ORDER
S, COMING ON FOR PRONOUNCEMENT OF

ORDER
S, THIS DAY, THE COURT MADE THE FOLLOWING:- 4

ORDER

The present civil revision petition under Section 115 of the Code of Civil Procedure (henceforth referred as 'CPC') is filed by the petitioners/original plaintiffs No.5, 7 and 9, aggrieved by the order dated 09.11.2020 passed by the learned Principal Civil Judge and JMFC at Humnabad (for short the 'Trial Court') in O.S.No.17/2019, by which the Trial court dismissed the suit filed under Order I Rule 8 of CPC as

withdrawn upon a memo filed by the respondent Nos.1 and 2/original plaintiffs No.6 and 10. 02. The brief facts leading up to filing of the present petition are that the petitioners the respondents No.4 to 10 herein who were the original plaintiffs invoking the provisions of Order I Rule 8 of CPC had filed the above suit in O.S.No.17/2009 against the respondents No.1, 2 and 3 herein who were the defendants in the said suit for relief of declaration to declare that the plaintiffs have got right of way as an easement of necessity on the suit way, which is 15 ft. wide road, passing in between the plot Nos.7 to 10 and 11 to 13 situated in land bearing Survey No.175 of 5 Humnabad town as shown in the suit schedule 'A' property and also for permanent injunction restraining them from causing illegal interference in the suit property and for mandatory injunction to dismantle and remove the illegal construction of function hall on the said property. 03. That an application under Order XXXIX Rule 1 and 2 of CPC filed in the said suit had been allowed by an order dated 08.02.2019. That the respondents No.1 and 2 herein had filed a written statement and issues had also been framed by the Trial Court on 22.08.2019 and the matter was posted for evidence. That when the matters stood thus, the respondents No.8 and 10 herein who were the plaintiffs No.6 and 10 in the said suit in collusion with respondents No.1 and 2 herein who were the defendants No.1 and 2, had filed a memo dated 09.11.2020 stating that the plaintiffs and the defendants had compromised the matter out of the Court and plaintiffs did not want to proceed with the case and as such sought for dismissal of the suit. That the Trial Court by an order dated 09.11.2020 dismissed the suit on the basis of the said memo for withdrawal filed by the respondents No.1 and 2 herein. 6

04. Thus, aggrieved by the aforesaid order the petitioners are before this Court.

05. Heard Sri. D. P. Ambekar, learned counsel for the petitioners and Sri. Ameet Kumar Deshpande, the learned counsel for the respondents No.1 and

2.

06. The learned counsel for the petitioners reiterating the grounds urged in the petition submits that; a) That the suit being one under Order 1 Rule 8 of CPC, the order passed by the Trial Court is in violation of Sub Rule

(4) of Rule 8 of Order I of CPC as no notice has been issued to the plaintiffs and all persons so interested as specified in Sub-Rule

(2) of Rule 8 of Order I CPC. b) That before passing the said order, the Trial Court ought to have substituted any persons having same interest in the suit in view of provisions of Sub Rule

(5) of Rule 8 of Order I CPC. 7 c) That the Trial Court without exercising the jurisdiction vested in it has committed illegality and jurisdictional error, while dismissing the suit based on the memo.

07. The learned counsel for the respondents opposing the above petition and justifying the impugned order submitted that; a) The revision petition, is not maintainable, as the order passed by the Trial Court on the memo, would not fall in the category of "any order if it had been made in favour of the petitioner would have finally disposed of the suit" as contemplated under proviso to Sub-Section

(1) of Section 115 of CPC. b) That any petition under Section 115 of CPC has to pass the test of proviso to Sub-Section

(1) of Section 115 of CPC irrespective of whether the order is final or interim and that the proviso cannot be culled out as a separate clause for 'interim order' or 'case decided', as it includes orders of all nature. 8 c) That relying upon the decision of the Apex Court in the case Shiv Shakti Coop, Housing Society, Nagpur vs. Swaraj Developers and others, reported in (2003) 6 SCC659 he submits that the proper remedy is only by a way of writ under Articles 226 of the Constitution of India. d) Alternatively he submits once permission is accorded to file a suit in the nature of representative capacity, the same includes right to compromise and that no separate order authorizing to compromise the suit is required. He relies upon the judgment in the case of Abdulla and another vs. Parshatam Singh and others reported in AIR1935 Lahore 33 and Biram Prakash Chela M. Puran Das and others vs. Narendra Das and others reported in 1961 Allahabad 266 (V48C62.

08. In reply to the question of maintainability the learned counsel for the petitioners submits that, 9 a) Sub-Section

(1) of Section 115 of the CPC is in respect in any case which has been decided by the Sub-Ordinate Court from which no appeals lies and this refers to the final orders. b) That proviso to sub-Section

(1) of Section 115 of CPC is in respect of interlocutory orders, thus he submits that there are two classes of orders as contemplated under Section 115 of CPC. Hence, he submits that the present petition is maintainable.

09. On thoughtful consideration of the rival submissions made by the learned counsel for the parties, the following points arise for consideration:- a. Whether the impugned order passed by the Trial Court dismissing the suit filed under order I Rule 8 of CPC on a memo for withdrawal is amenable for revision under Section 115 of CPC.?. b. Whether the order passed by the Trial Court suffers from illegality or with material irregularity.?. 10

10. Before adverting to the submissions made by the learned counsel for the parties, it is apposite to refer the Section 115 of CPC, which is extracted hereunder:-

"115. Revision - (1) The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears- (a) to have exercised a jurisdiction not vested in it by law, or (b) to have failed to exercise a jurisdiction so vested, or (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit. [Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings].. [(2) The High Court shall not, under this section vary or reverse any decree or order against which an appeal lies either to the High Court or to any Court subordinate thereto.]. 11 [(3) A revision shall not operate as a stay of suit or other proceeding before the Court except where such suit or other proceeding is stayed by the High Court].. [Explanation,- In this section, the expression "any case which has been decided" includes any order made, or any order deciding an issue, in the

course of a suit or other proceeding]..

11. A perusal of Section 115 of the CPC makes it clear that in order to invoke the revisional powers of the High Court, the following conditions must exists:- I. There must be a case decided. II. The Court deciding the case must be subordinate to the High Court. III. No appeal should lie to the High Court against the said decision. IV. In deciding the case the subordinate court must appear to have:- a) Exercised a jurisdiction not vested in it by law; or b) failed to exercise a jurisdiction so vested, or c) acted in the exercise of its jurisdiction illegally or with material irregularity.

12. Therefore sub-Section (1) of Section 115 refers only to a case decided by any Subordinate Court in which no appeals lies thereto. Proviso to sub-Section (1) refers to 12 "any order made" or "any order deciding an issue in the course of the suit or other proceedings which has an effect of finally disposing of the suit had it been made in favour of parties seeking revision. This invariably refers to interlocutory orders. 13 Explanation provided to Section 115 is significant. Wherein it is made clear that the expression "any case which has been decided" includes "any order made, or any order deciding an issue, in the course of a suit or other proceedings."

14 Thus, from plain reading of the provisions of Section 115 of CPC it is clear that sub-Section (1) deals with "any case which has been decided" and "from which no appeal lies" and proviso to Sub Section (1) specifically deals with the interlocutory orders which if he had been passed in favour of parties seeking revision would have resulted in the disposal of the suit or other proceedings. 13 15 The Apex Court in the case Shiva Shakti (supra) dealing with maintainability of revision petition after the amendment to Section 115 under Act 46 of 1999 with effect from 01.07.2002 has held that a question needs to be asked if whether the order in favour of the party applying for revision in the Courts below would have given finality to the suit of proceedings and if the answer is an affirmative then the application was maintainable and otherwise not. The Apex Court while comparing with the provision of Section 115 of CPC prior to and subsequent to the amendment, at Para No.12 had taken note of the recommendation of law

commission of India which is extracted hereunder;

"12. It is interesting to note that the Law Commission of India had recommended deletion of Section 115. In the Law Commission's opinion, provisions of Section 115 are analogous to provisions of Article 227 of the Constitution of India (in short "the Constitution") and the litigants would not be prejudiced in any way if the entire section is deleted. The Joint Committee of Parliament discussed these recommendations and only thought it proper to make certain modifications in the section. That led to amendment of Section 115 by the Old Amendment Act. The deliberations of the Committee are reflected in the following words; "The Committee, however, feel that, in addition to the restrictions contained in Section 115, an overall restriction on the scope of applications for revision against interlocutory orders should be imposed. Having 14 regard to the recommendations made by the Law Commission in its 14th and 27th Reports, the Committee recommended that Section 115 of the Code should be retained subject to the modification that no revision application shall lie against an interlocutory order unless either of the following conditions is satisfied, namely; (i) that if the orders were made in favour of the applicant, it would finally dispose of the suit or other proceeding; or (ii) that the order, if allowed to stand, is likely to occasion a failure of justice or cause an irreparable injury."

(emphasis add by this Court).

16. Further applying the principles of golden rule of interpretation the Apex Court in the aforesaid case at Para No.32 has held as under:- "A plain reading of Section 115 as it stands makes it clear that stress is on the question whether the order in favour of party applying for revision would have given finality to suit or other proceedings. If the answer is "yes" then the revision is maintainable. But on the contrary, if the answer is "no" in the revision is not maintainable. Therefore, if the impugned order is interim in nature and does not finally decide the lis, the revision will not be maintainable. The legislative intent is crystal clear. Those orders, which are interim in nature cannot be subject matter of revision under Section 115.

17. It is necessary to note at this juncture the issues that fell for consideration of the Apex Court in the aforesaid judgment was that, the High Courts concerned had

held that because of amended Section 115 of CPC, the revision filed before them was not maintainable, as had an order been 15 passed in favour of the party applying for revision, the same would not have finally disposed off the suit or other proceedings. The subject for consideration was in principle in respect of interim orders.

18. The Apex Court in the case of Tek Singh vs. Shashi Verma and Another reported in (2019) 16 SCC678while referring to the proviso to Sub Section (1) of Section 115 of CPC has held that "A reading of this proviso will show that, after 1999, revision petitions filed under Section 115 CPC are not maintainable against interlocutory orders."

Thus, thereby clarified the position that proviso to Sub Section (1) of Section 115 of CPC bars filing of revision petition against interlocutory orders except where the order, if it had been made in favour of the party applying for revision, would have finally disposed off the suit or other proceedings.

19. Interlocutory order is an order other than final decision. Generally interlocutory order does not decide any matter in issue arising in the suit and does not decide legal rights of the parties to the litigation. Division Bench of this 16 Court in the case of Vijay Bank Employees Cooperative Society vs. C. Srinivas Raju reported in ILR1990 Kant. 2451 dealing with the scope of revision under Section 115 of CPC has held at paragraph No.14 as under:

"14. Thus it is clear that an interlocutory order in a suit or proceeding can be held to be a 'case decided' if by such an order there is an adjudication for the purpose of the suit or proceeding some right or obligation of the parties thereto in controversy but not every order passed in the course of a suit or proceeding irrespective of the fact whether it decides some right or obligation of the parties in controversy. In the course of a suit or proceeding, several orders are passed by the Court trying a suit or proceeding. Every such order cannot be held to decide some right or obligation of the parties. However, there are several orders passed during the course of a suit or proceeding affecting the rights and obligations of the parties to the suit or proceeding. Such rights may be substantive rights or procedural rights.....

20. It is thus for these reasons, the proviso to Sub Section (1) of Section 115 of CPC qualifies that for the purpose of invoking the revisional jurisdictional of the High Court under Section 115 of CPC, an interlocutory should pass the test of provided under the proviso. However, no such test seems to have been prescribed in respect of order which amounts to a "case decided" as contemplated under Sub Section (1) of Section 115 of CPC. 17

21. Thus, even after the amendment to Section 115 of CPC the original position with regard to the power of the High Court calling for records of any case which has been decided by any Court, Subordinate to the High Court from which no appeal lies has remain unaltered. The amendment has only qualified the revisional power of the High Court with regard to the interlocutory orders, as noted hereinabove.

22. In the instant case, a memo dated 09.11.2020 filed by the plaintiff is signed only by two plaintiffs. The memo reads as under:- "Memo" Your Honour, In the above case plaintiff submits as under:- That, the plaintiff and defendants are compromised out of Court, in this way the plaintiff have does not want to proceed the above case, so the planitiff are going to withdarw the above case, and the above case may kindly be dismissed for adjudicating the matter, to meet the ends of justice. Hence, this memo Dated:

09. 11.2020. Plaintiffs; Through Vasant and others Sd- 1). Sd/- Adv. For plaintiffs. 2). Sd/- 18 23. Upon receipt of the said memo, the Trial Court has passed the following;

ORDER

Case called out. Defendant No.1 present Sri. S.M.R.. Advocate filed a memo for withdrawing the suit as not-pressed.. In view of the memo the suit is dismissed. As not- pressed. Sd/- 09.11.2020 24. The aforesaid order dismissing the suit passed on the memo for dismissal is neither a decree nor an order from which an appeal is provided either under Section 96 or under Section 104 read with Order 43 of CPC. The said order would fall in the category of "case decided" within the ambit of Sub section (1) of Section 115 of CPC. Hence, the present Revision Petition is

maintainable. The first point raised in this petition is answered accordingly.

25. Adverting to the second point raised hereinabove, the order under challenge passed dismissing the suit as not-pressed upon a memo dated 09.11.2020, is palpably illegal and suffers from material irregularity. The manner in which the Trial Court has accepted the memo 19 filed by only two out of ten plaintiffs and acting thereupon dismissed the suit even in the absence of the person filing the said memo, without complying with Sub Rule (4) of Rule 8 of Order 1 of CPC is nothing but illegal exercise of jurisdiction not being in compliance with the mandatory requirement of law. The suit in question as noted above was one under Order I Rule 8 of CPC. The provisions of Order I Rule 8 of CPC is extracted hereunder:-

"8. One person may sue or defend on behalf of all in same interest -

(1) Where there are numerous persons having the same interest in one suit.- (a) One or more of such persons may, with the permission of the Court, sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested; (b) the Court may direct that one or more of such persons may sue or be sued, or may defend such suit, on behalf of, or for the benefit of, all persons so interested,

(2) The Court shall, in every case where a permission or direction is given under sub-rule (1), at the plaintiff's expense, give notice of the institution of the suit to all persons so interested, either by personal service, or, where, by reason of the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf, or for whose benefit, a suit is instituted, or defended under sub-rule (1), may apply to the court to be made a party to such suit,

(4) No part of the claim in any such suit shall be abandoned under sub-rule

(1) and no such suit shall be withdrawn under sub-rule (3), of rule 1 of Order XXIII, and no agreement, compromise or satisfaction shall be 20 recorded in any such suit under rule 3 of that Order, unless the Court has given, at the plaintiff's

expense, notice to all persons so interested in the manner specified in sub-rule (2).

(5) Where any person suing or defending in any such suit does not proceed with due diligence in the suit or defence, the Court may substitute in his place any other person having the same interest in the suit.

(6) A decree passed in a suit under this rule shall be binding on all persons on whose behalf, or for whose benefit, the suit is instituted, or defended, as the case may be. Explanation.- For the purpose of determining whether the persons who sue or are sued, or defend, have the same interest in one suit, it is not necessary to establish that such persons have the same cause of action as the persons on whose behalf or for whose benefit, they sue or are sued, or defend the suit, as the case may be.

26. The suit under Order 1 Rule 8 of CPC is in the nature of a representative suit. It is settled law that the object of Rule 8 of Order 1 of CPC is to facilitate the decision of question in which large number of persons are interested without recourse ordinary procedure. Order I Rule 8 provides that when there are numerous persons having the same interest in one suit, one or more or such persons may with the permission of the Court sue on behalf or for the benefit all persons so interested. An application submitted under Rule 8 of Order 1 of CPC cannot be granted straightway but a notice of such application is to be 21 published by the Court in the daily newspaper having circulation in the said locality at the expense of the plaintiff. The people interested in the suit or opposing the suit may come and join the proceedings.

27. Sub-Rule (4) of Rule 8 of Order 1 CPC mandates that no part of the claim in any such suit be abandoned under sub-Rule (1), and no such suit shall be withdrawn under Sub-Rule (3) of Rule (1) of Order 23 of CPC and no agreement, compromise or satisfaction shall be recorded in any suit under Rule 3 of that order unless the Court has given at the plaintiffs' expenses, notice to all persons interested in the manner specified in sub-Rule (2).

28. Sub-Rule (5) of Rule 8 casts duty upon the Court that where any person suing or defending in any such suit does not proceed with due diligence in the suit or

defence, the Court may substitute in his place any other person having the same interest in the suit.

29. Sub-Rule (6) of Rule 8 of CPC provides that the decree passed in a suit under this Rule shall be binding on all the persons on whose behalf or for whose benefit, the suit is instituted or defended as the case may be. 22

30. Thus, in view of the very nature of proceeding which is representative in character, a duty is cast on the Court to see that interest of those on whose behalf suit is permitted to be instituted is safeguarded. It is in this regard condition precedent in the nature of Court issuing a notice to all persons at the expenses of the plaintiff so interested in the manner specified in Sub-Rule (2) of Rule 8 of Order I of CPC is imposed before any such suit is abandoned and before recording satisfaction on any agreement or compromise.

31. Thus, from the above order it is clear that there has been no compliance of the mandatory requirement of issuing notice to all persons interested in the manner provided under sub-Rule (4) of Rule 8 of Order 1 of CPC.

32. As regards the alternate submission made by the learned counsel for the respondent referring to the judgment of Lahore High Court in the case of Abdulla and Another (Supra) and judgment of Allahabad High Court in the case of Biram Prakash Chela (Supra) to the effect that 23 once permission to sue is given to certain representatives to litigate on behalf of general public, then that right should carry with it a right to compromise, is completely on a different footing. It may be that once the permission is given to certain representatives, the said right would carry with it a right to compromise, however, such right can be invoked and accepted by the Courts only in compliance with mandatory requirement of Sub Rule (4) of Rule 8 of Order 1 CPC. Therefore, the reliance placed on the aforesaid judgments by the learned counsel for the respondent cannot apply to the present facts and circumstances.

33. In the result, the following;

ORDER

a. The Civil Revision Petition No.200003/2021 is allowed. b. The Order dated 09.11.2020 passed in O.S.No.17/2019 by the Principal Civil Judge and JMFC at Humnabad is set- aside. 24 c. The suit in O.S.No.17/2019 is restored to the file of Principal Civil Judge and JMFC at Humnabad. d. The Principal Civil Judge and JMFC, at Humnabad to proceed with the matter in accordance with law from the stage prior to its dismissal. Sd/- JUDGE KJJ

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