

**Seenappa and Others Vs. Subbaiah and Others**

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**SooperKanoon Citation :** [sooperkanoon.com/373655](http://sooperkanoon.com/373655)

**Court :** Karnataka

**Decided On :** Nov-20-1998

**Reported in :** ILR1999KAR1543; 2000(1)KarLJ584

**Judge :** K.R. Prasada Rao, J.

**Acts :** [Code of Civil Procedure \(CPC\), 1908](#) - Order 7, Rule 10 - Order 23, Rule 1(4)

**Appeal No. :** Civil Revision Petition No. 579 of 1998

**Appellant :** Seenappa and Others

**Respondent :** Subbaiah and Others

**Advocate for Def. :** Sri K.S. Nagaraja Rao, Adv.

**Advocate for Pet/Ap. :** Sri S. Sudarshan Reddy, Adv.

**Judgement :**

ORDER

1. This revision petition is filed by the defendants in O.S. No. 276 of 1994 on the file of the Court of Additional Civil Judge (Junior Division), Bangalore Rural District against orders passed on 9-1-1998 (sic) dismissing the said application.

2. Revision petitioners who are the defendants 3 to 6 in the suit O.S. No. 276 of 1994 filed the application LA. VI under Order 23 Rule 1(4) of the CPC praying to

dismiss the suit as the same is barred under the said provisions. The said application was dismissed by the Trial Court holding that the suit is not barred under the provisions of Order 23, Rule 1(4) of the CPC. Aggrieved by the said order, defendants 3 to 6 filed the present revision petition.

3. It is the contention of the revision petitioners-defendants 3 to 6 that the respondent-plaintiffs have previously filed a suit O.S. No. 6496 of 1989 in the City Civil Court, Bangalore for partition and separate possession of their alleged share in the suit schedule property and in the said suit Smt. Muniyamma, the wife of the deceased first defendant and the mother of these defendants was arrayed as third defendant. The said Muniyamma died in the year 1993 during the pendency of the suit O.S. No. 6496 of 1989. Though the defendants intimated the death of Smt. Muniyamma by filing a memo in the said Court on 2-11-1993, the plaintiffs have not taken any steps to bring the L.Rs on record. So, the said suit stood abated against the said Muniyamma. However, on 14-11-1994 the Court passed an order ordering for return of the plaint for presentation before proper Court, since it had no territorial jurisdiction to try the suit, as the suit properties are situated outside the jurisdiction limits of the said Court. Instead of taking return of the plaint and presenting the same in the appropriate Court, plaintiffs have filed the present suit in the Trial Court for the same relief of partition and separate possession of their share in the suit properties. Defendants 3 to 7 therefore filed LA. VI in the Trial Court contending that the present suit filed is not maintainable since plaintiffs have not taken leave of the Court as required under the provisions of Order 23, Rule 1(4) of the CPC to withdraw the earlier suit and to file a fresh suit on the same cause of action. To the said application, the plaintiffs have filed their objections contending that since the suit properties are admittedly situated outside the jurisdiction limits of the City Civil Court, Bangalore, the said Court had no jurisdiction to entertain that suit. Though the City Civil Court ordered for return of the plaint for presentation to proper Court, it does not preclude them from initiating a fresh suit for partition in the Trial Court which has got jurisdiction to entertain the suit. It is further contended by them that not taking return of the plaint of the previous suit and not presenting it in proper Court is a technical defect and it does not preclude them from filing a fresh suit for partition.

4. After hearing the arguments advanced on both sides on the said application, the Trial Court dismissed the said application holding that, since the cause of action for filing the suit for partition is a recurring one, it is not necessary for the plaintiffs to obtain permission of the Court below to withdraw the earlier suit filed by them and to seek permission to file a fresh suit and they could as well abandon their previous suit which was filed in the Court which has no jurisdiction and to bring the second suit for the same relief. It is also observed by the Trial Court that Muniyamma the 3rd defendant in the earlier suit O.S. No. 6496 of 1989 died on 23-8-1993, and since her husband who is the 1st defendant in the same suit is a party to the said suit, (sic) was an effective representation of the estate of Muniyamma and the earlier suit did not stand abated as contended by the defendants. The Trial Court therefore dismissed I.A. VI.

5. Learned Counsel for the revision petitioners-defendants 3 to 7 vehemently contended that the Trial Court was not justified in entertaining the present suit O.S. No. 276 of 1994 when the plaintiffs who filed the earlier suit O.S. No. 6496 of 1989 have failed to comply with the orders passed by the City Civil Court to take return of the plaint and present it in appropriate Court and when they have not sought for permission to withdraw the earlier suit with liberty to file a fresh suit for the same relief of partition claimed by them, when the 2nd suit O.S. 276 of 1994 is clearly barred under the provisions of Order 23, Rule 1(4) of the CPC. In support of this contention, he relied upon a decision of this Court rendered in Papinayakanahalli Venkanna and Others v Janadri Venkanna Setty and Others, wherein it was held that 'Order 23, Rule 1(4) of the CPC precludes a party from instituting a fresh suit in respect of the same subject-matter or part of the claim. When the subject-matter or the claim is the eviction of tenant, founded on the bona fide requirement of the landlord and that the premises are required for demolition and reconstruction, another proceeding on the same subject-matter cannot be instituted'.

6. In the instant case, admittedly, the earlier suit O.S. No. 6496 of 1989 was filed in the City Civil Court, Bangalore which had no territorial jurisdiction to entertain the suit. As the said Court has ordered for return of the plaint for presentation before proper Court and as the plaintiffs have not chosen to take return of the plaint to present it in proper Court, it cannot be said that the earlier suit is still pending in

a Court of competent jurisdiction. So, the question of taking the permission of the Court for withdrawing the earlier suit and for filing a fresh suit under the provisions of Order 23, Rule 1(4) of the CPC did not arise. Under the provisions of Order 7, Rule 10 of the CPC when the suit is filed in a Court which has no jurisdiction to entertain the suit, the plaint can be returned by the said Court for presentation to the proper Court which has got jurisdiction, within the time prescribed by the said Court. It is only a concession given to the parties to take return of the plaint to present the same in proper Court, so that they need not pay fresh Court fees and file a fresh suit for the same relief in a Court of competent jurisdiction. If the plaintiff does not avail the said concession and does not present the same plaint on which he had paid the Court fees in a Court of competent jurisdiction, it does not bar him to file a fresh suit by again paying Court fees in a Court of competent jurisdiction. It is nowhere mentioned under the provisions of Order 7, Rule 10 of the CPC that a party is not entitled to file a fresh suit in a Court of competent jurisdiction, if he does not choose to take return of the plaint filed in a wrong Court for presentation in proper Court, availing the concession given to him. As rightly pointed out by the learned Counsel for the respondents, since a decree passed by a Court which has no jurisdiction to entertain the suit will be nullity and will have no effect in law, there is no bar for the plaintiffs to file a fresh suit in a Court of competent jurisdiction. It is also pointed out by the learned Counsel for the respondents that the enquiries made by the respondents in City Civil Court disclosed that the records of O.S. No. 6496 of 1989 are also missing and they are not traced. It is therefore, pointed out by him that, it will be a futile exercise to direct the plaintiffs to take return of the plaint in that suit and to re-present it in a Court of competent jurisdiction at this stage, particularly when the time given for taking return of the plaint and for presenting the plaint in proper Court has expired long back. As it is now found that there is no bar for filing a fresh suit in a competent Court which has got territorial jurisdiction to try the suit under the provisions of Order 7, Rule 10 of the CPC, I feel that it is no longer necessary to direct the plaintiffs to take return of the earlier plaint filed in O.S. No. 6496 of 1989 and to re-present it in a Court of proper jurisdiction.

7. Even the 2nd contention taken by the learned Counsel for the revision petitioners that the present suit O.S. No. 276 of 1994 filed by the plaintiffs is barred

under the provisions of Order 23, Rule 1(4) of the CPC since the plaintiffs have not withdrawn the earlier suit and have not taken leave of the Court to file a fresh suit for the same relief of partition and separate possession of their share is without any merits, as the earlier suit was not filed in a Court which has got territorial jurisdiction to entertain the suit and the City Civil Court in which the earlier suit was filed had no jurisdiction to grant any such permission to the plaintiffs to withdraw the suit and to grant leave to file a fresh suit. Since the plaintiffs have not chosen to take return of the plaint in the previous suit and have not represented it in a Court of competent jurisdiction, it cannot also be said that the said suit is still pending in any competent Court and it must be taken that the plaintiffs have abandoned the earlier suit by not pursuing the same, though they did not get it dismissed. So, there was no need for the plaintiffs to seek for permission to withdraw the earlier suit and to file a fresh suit and the provisions of Order 23, Rule 1(4) of the CPC are not attracted to the present case. Apart from this fact, as rightly pointed out by the Trial Court, the cause of action for a partition suit being a recurring cause of action, withdrawal of an earlier suit for partition of joint family properties though without permission of the Court, is not a bar to file a second suit for partition of the same properties against the same defendants. For this reason also though the plaintiffs have not obtained permission of the City Civil Court for filing a fresh suit by withdrawing the earlier suit, they are entitled to file a fresh suit for partition and the bar under Order 23, Rule 1(4) of the CPC does not apply to such a suit. In the present case, since they have not pursued the earlier suit filed by them which has been filed in a Court which has no jurisdiction, the said earlier suit cannot be deemed to be pending and when the plaintiffs have not chosen to take return of the plaint to present it in proper Court within the time given by the Court, it cannot be contended that the present suit filed by the plaintiffs is barred under the provisions of Order 23, Rule 1(4) of the CPC.

8. For the above reasons, the decision relied upon by the learned Counsel for the revision petitioners is not applicable to the facts of the present case. I therefore, find no merits in the present revision petition.

9. This revision petition is therefore, dismissed.

