

Bhutha Vs. Baburao

Bhutha Vs. Baburao

SooperKanoon Citation : sooperkanoon.com/373885

Court : Karnataka

Decided On : Mar-14-1974

Reported in : AIR1975Kant101; ILR1974KAR814; 1974(2)KarLJ164

Judge : M.S. Nesargi, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 23, Rules 1(1) and 1(2)

Appeal No. : Civil Revn. Petn. No. 2579 of 1973

Appellant : Bhutha

Respondent : Baburao

Advocate for Def. : T.S. Ramachandra, Adv.

Advocate for Pet/Ap. : D. Chaluvaraj, Adv.

Judgement :

ORDER

1. Plaintiff in O. S. No. 511 of 1965 on the file of the Munsiff, Sagar, has filed this revision petition against the order dated 18-7-1973 passed on I. A. No. 3 in O. S. No. 511 of 1965.

2. By I. A. No. 3, the plaintiff requested the Court to grant him permission to withdraw the suit with liberty to file a fresh suit on the same cause of action. The learned Munsiff, after hearing both the sides ordered that the plaintiff is allowed to

withdraw the suit, but the permission to file fresh suit on the same cause of action was not granted. This order is challenged in this revision petition.

3. Shri Cheluvaraja, learned Advocate appearing on behalf of the petitioner urged that the application I. A. No. 3 filed by the petitioner-plaintiff was under Order 23, Sub-rule (2) of Rule 1 of the Code of Civil Procedure and, therefore, the learned Munsiff ought not to have treated it as an application under Sub-rule (1) itself and split up the prayer of the petitioner-plaintiff and granted one part of it and rejected the other part of it.

4. Shri T. S. Ramachandra, learned Counsel appearing on behalf of the respondent-defendant contended that what is clear from the order of the learned Munsiff is that the petitioner-plaintiff was allowed to withdraw the suit and was not permitted to file a fresh suit on the same cause of action and, therefore, it is open to the petitioner either to withdraw the suit or to prosecute it as it stands.

5. I find considerable force in the contention of Shri Cheluvaraju. In *Veeraswami v. Lakshmudu*, : AIR1951 Mad715 , it is observed as follows;

'Where a plaintiff files a petition to withdraw the suit with permission to file a fresh suit regarding the same subject-matter, under Order 23, Rule 1 (2) the Court has got the right to dismiss the petition telling him that he might withdraw the suit if he wants but that it will not give him permission to file a fresh suit regarding the same subject-matter. The Court cannot divide the petition into two and accept the withdrawal and refuse the liberty in the same order.' Similar is the view expressed by K. N. Wanchoo, C. J., in *Naru v. Noji*, . It is held therein as follows; 'If a plaintiff merely desires to withdraw a suit all he has to do is to make an application under Sub-rule (1) of Rule 1 of Order 23. But where he applies under Sub-rule (2) what he wants is that he should be permitted to Withdraw the suit with permission to institute a fresh suit. Therefore, when an application is made under Sub-rule (2), it is not open to the Court to treat it as if it is an application under Sub-rule (1) without any condition and to grant the prayer for withdrawal and refuse the prayer for permission to bring a fresh suit. The prayer under Sub-rule (2) must be treated as one whole and the Court may either reject the entire prayer, or allow the entire prayer i.e., permit the withdrawal of the suit with liberty to bring a fresh suit. The

reason in that if the court grants him the permission to withdraw but refuses the permission to institute a fresh suit, the result would be that the plaintiff would be deprived of carrying on with the suit as best as he can and would also not be permitted to file a fresh suit on the same cause of action. It was not the intention of the legislature that the plaintiff should be put to this loss by breaking up the prayer for withdrawal with permission to file a fresh suit about the same subject-matter into two parts.'

6. I respectfully agree with the above-cited two decisions and hold that the order passed by the learned Munsiff, Sagar, is not sustainable in law. He ought to have either rejected the application -- I. A. No. 3 as a whole or granted it as a whole. He could not have split up the application and grant a part of it and reject the remaining,

7. In the result, I allow this petition and set aside the order dated 18-7-1973 passed on I. A. No. 3 in O. S. No. 511 of 1965, on the file of the Munsiff, Sagar. I direct the learned Munsiff to proceed to dispose of I. A. No. 3 according to law, bearing in mind the observations made in the body of this order

8. No order as to costs.

9. Revision allowed.