

V. Narayanappa Vs. Narayanappa and anr.

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Court : Karnataka

Decided On : Mar-16-1971

Reported in : AIR1971Kant334; AIR1971Mys334; (1971)1MysLJ531

Judge : H.B. Datar, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 115 - Order 23, Rule 1

Appeal No. : Civil Revn. Petn. No. 1118 of 1969

Appellant : V. Narayanappa

Respondent : Narayanappa and anr.

Advocate for Def. : B.V. Balaji, Adv.

Advocate for Pet/Ap. : D. Ramaswamy Iyengar, Adv.

Disposition : Petition allowed

Judgement :

ORDER

H.B. Datar, J.

1. The short question that arises for consideration in this revision petition is whether the court below was justified in granting permission to the plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action.

2. The plaintiff filed O. S. No. 425/64 on the file of the Munsiff, Chickkabalapur. The evidence in the suit was closed by 17-7-1967 and arguments were also heard in part on 24-7-1967. At that stage, an application for amendment of the plaint was filed. That application was rejected and a revision petition C. R. P. No. 1623 of 1967 (Mys) was filed before this court. This court held that the order declining to grant the amendment was one within the jurisdiction of the court below and hence could not be interfered with. After the dismissal of the revision petition by this court, the plaintiff filed I. A. 10 under Order 23, Rule 1 read with Section 151 of the Code of Civil Procedure stating that regarding adoption, due to some mistake and inadvertence, the time, manner of adoption, custom and other details were not pleaded, that it was a defect in the plaint on account of which he was precluded from leading evidence and that therefore, liberty should be given to him to withdraw the suit. Defendant 1 resisted that application and submitted to the court that the grant of permission at that stage to withdraw the suit could not be given, that the only desire of the plaintiff in withdrawing the suit was to harass the defendant and that, therefore, the application should be rejected.

3. The learned Munsiff was of the view that the ground upon which the withdrawal of the suit was sought was that there is a formal defect in the plaint and that the formal defect consists in not specifically pleading all facts relating to the adoption of the plaintiff. He, therefore, held as under:--

'.....Upon a perusal of the plaint. it is clear that what the plaintiff ultimately claims is a partition of the suit schedule properties on the ground of his alleged adoption by the first defendant and also on some other grounds. This fact, it is clear has not been properly pleaded in the plaint. It is true that the plaintiff has come with his application at a stage when the suit is posted for arguments, but that need not deter the court from considering the application on merits. Since the failure to specifically plead necessary facts regarding the alleged adoption as also the failure to plead the grounds upon which the plaintiff is entitled to the relief are to be considered sufficient grounds within the meaning of Order 23, Rule 2 (c), I am of opinion that necessary permission to withdraw the suit has to be granted to the plaintiff.....'

It is this order that is challenged now before this court.

4. The learned Advocate for the petitioner contended that the court below had over-looked the principles governing the grant of permission for withdrawing a suit with liberty to file a fresh suit, that it can be granted only when the court is satisfied that the suit is going to fail by reason of some formal defect or for other sufficient reasons. It was urged that the order of the court below does not disclose that there was either a formal defect or there are other sufficient reasons enabling it to grant permission to withdraw the suit. In support of this submission, he relied upon several decisions of courts first of which is reported in *Jumma v. Ram Sahai* : AIR1934 All137 . In that case the court followed the earlier judgment of Sir Henry Richards, C. J.. which is to the following effect :--

'I consider that a court ought to be very slow to give liberty to bring a fresh suit after a case has been heard out on the merits.....I do not think that it ever was intended that a plaintiff should have the power of trying out his case and then at the last moment asking for leave to withdraw with permission to bring a fresh suit. The mere ordering of the plaintiff to pay the defendant's costs does not compensate the latter for being sued a second time.'

The court also further held that when the lower court grants permission to a party to withdraw the suit with liberty to file a fresh suit in contravention of Order 23 Rule 1, the High Court would be justified in interfering with the order on the ground that the court below has not judicially exercised its discretion, that is to say that it had not taken into account the provisions of the Rule and decided the matter to the best of its ability in accordance with those provisions.

5. The second case relied upon is a Full Bench decision of the Bombay High Court in *Ramrao v. Appanna* AIR 1940 Bom 121 (FB) wherein it has been held, the expression 'formal defect' must be given a wide and liberal meaning and must be deemed to connote every kind of defect which does not affect the merits of the case, whether that defect be fatal to the suit or not. 'Formal defect' includes misjoinder of parties or of the matters in suit, rejection of a material document for not having a proper stamp and the erroneous valuation of the subject-matter of the suit. Their Lordships further held that the plaintiff could not withdraw the suit to file

a fresh suit claiming title on the ground of adverse possession as there was no defect of form in the suit but a defect of substance arising out of plaintiff's inability to prove the title on which he had based his claim. It was held that when the court allowed an application contrary to the provisions of Order 23 Rule 1 (2) it was an order without jurisdiction and that the revision petition was maintainable in law.

6. The High Court of Calcutta In the case reported in Abdul Sobhan v. Samasuddin Ahmed : AIR1931 Cal336 has laid down that a court should give adequate reasons when granting permission to a plaintiff to withdraw the suit. When there is no finding as to the formal defect on account of which the suit must fail the court has no jurisdiction to permit a fresh suit to be brought. Similar is the view in the later judgment of the Allahabad High Court in Baldeo Dass v. Gauri Dutt : AIR1953 All329 where it has been stated that if the object of the application made under O. 23, Rule 1 is to attempt to introduce a new matter in controversy then that cannot be done by permitting the party to withdraw the suit and file a fresh suit.

7. It is clear from the material on record in this case that the plaintiff tried to have the matter of adoption brought before court by means of an application for amendment. That application was rejected and this court declined to interfere with that order as the same could be challenged by the plaintiff in an appeal under Section 105 C: P. C., if the plaintiff failed in the suit and filed an appeal before the appellate court. When the plaintiff's attempt to have the amendment of the plaint failed the present application is filed stating that there is a formal defect. The defect stated in the present case should not come into any of the categories of 'formal defect' stated in AIR 1940 Bom 121 (FB). I am of the view that the court below had no jurisdiction in these circumstances to grant permission or liberty to withdraw the suit with permission to file a fresh suit. The only reason stated by the learned Munsiff is that the plaintiff having failed in his amendment application is denied an opportunity to prove the matter and hence there is a formal defect. This view taken by the learned Munsiff as to what 'formal defect' is, in my opinion, plainly erroneous. Having regard to the principle stated earlier, this is a case in which the attempt to introduce a new matter at a late stage having failed, the plaintiff wants to take advantage of having a fresh trial by having the other matters

which were rejected being brought into the new suit. That is not the object for which the provision is made under Order 23, Rule 1 C. P. C., I am therefore, of the opinion that the court below has exercised the jurisdiction not vested in it by allowing the plaintiff to withdraw the suit with liberty to file a fresh suit That order has to be set aside.

8. In the result, the revision petition is allowed; the order of the court below passed on 6-1-1969 in O. S. No. 425/64 is set aside. IA No. 10 is dismissed. The learned Munsiff is now directed to hear and dispose of the original suit in accordance with law.

9. No costs.

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