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Shivakumaraswamy Vs. Lingappa

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Court : Karnataka

Decided On : Jul-30-1991

Reported in : ILR1991KAR3991

Judge : P.K. Shyamsundar, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 23, Rule 1(3) and 1(5)

Appeal No. : C.R.P. No. 2786 of 1989

Appellant : Shivakumaraswamy

Respondent : Lingappa

Advocate for Def. : G.S. Visweswara, Adv. for R-1 to R-3

Advocate for Pet/Ap. : R. Sridhar Hiremath, Adv.

Disposition : Petition dismissed

Judgement :
ORDER

Shyamsundar, J.

1. Clearly the Court has committed a faux pas in passing the impugned order under which it permits the petitioner to withdraw the suit while refusing the prayer to renew the suit on the same cause of action. The order in question was made at

the behest of the plaintiff who is the petitioner in this case pursuant to an application made under Order 23 Rule 1 C.P.C. seeking leave to withdraw the suit with liberty to file a fresh suit on the same cause of action. There were in all five parties to the suit. Plaintiff-1 is the petitioner herein. Plaintiff-2 is respondent- 4. Defendant-1 is the father of plaintiffs 1 and 2 and defendants 2 and 3. The suit was for partition of several properties.

2. Out of the suit properties, one item was claimed to be the self acquisition of the father in which stand he received support from the second respondent who is the other son. The suit was pending for some time. The plaintiff later thought it fit not to antagonise his father who it is said had assured the petitioner a share in the property if he withdrew the suit, had therefore filed an application under Order 23 Rule 1 referred to supra. On that application the learned Judge passed the impugned order granting permission to withdraw but refusing leave to renew the suit at a later stage.

3. The order in question, said to be one passed under Order 23 Rule 1 (3) reads:

'In the result, for the foregoing reasons, I.A.VIII is hereby allowed further it is ordered that the plaintiffs are not permitted to file a fresh suit on the same cause of action. Consequently, the plaintiff's suit is hereby dismissed. Considering the peculiar circumstances of the case, I direct each party to bear his or their own costs.'

Rules 3 and 5 of Order 23 of the C.P.C. being the relevant provisions to note read:

'Rule (3) Where the Court is satisfied -

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject matter of such suit or such part of the claim.

Rule (5) Nothing in this Rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule (1), or to withdraw, under Sub- rule (3), any suit or part of a claim, without the consent of the other plaintiffs.'

A combined reading of Sub-rules (3) and (5) of Order 23 makes it evident that where the Court is satisfied that a suit must fail by reason of some formal defect or there are sufficient grounds for allowing the plaintiff to institute a fresh suit regarding the subject-matter of the suit or part of a claim it will then allow him to withdraw the suit, necessarily reserve to such plaintiff liberty to file a fresh suit in respect of the subject matter of the suit or such part of the claim etc. This is a case in which the Court had granted leave to withdraw the suit to enable the plaintiff to settle the matter out of Court with his father. In those circumstances the Court should have necessarily armed the plaintiff with the liberty to file a fresh suit while granting leave to withdraw the suit so that he can join in legally if there was no settlement. But the learned Judge, as stated earlier, in the course of the impugned order granted leave but refused permission to file a fresh suit at a subsequent stage has thus committed a glaring error in passing the order. But that does not bring any solace to the petitioner in view of Sub-rule (5) of Order 23 which enjoins that where there are several plaintiffs, one of them alone cannot withdraw the suit under Sub- rule (3) or part of a claim without the consent of the other plaintiffs. It is not denied that the petitioner herein had not obtained the consent of the other plaintiff who is none other than his brother. Under the circumstances this is a case in which the Court could not have granted the leave sought for acting under Order 23 Rule 3 at all. Thus the petitioner finds himself in a no-win position, that is because neither he nor the Court had appropriately acquainted themselves with the provisions referred to above.

4. In the circumstances, this Revision Petition fails and is hereby dismissed, inter alia, the application made by the petitioner under Order 23 C.P.C. i.e., I.A.VIII also stands rejected.

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