Devassi Vs. Anthoni

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Court : Kerala

Decided On : Feb-21-1968

Reported in : AIR1969Ker78

Judge : P.T. Raman Nayar, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Sections 2(2) and 96 - Order 1, Rule 10 - Order 9, Rule 8 - Order 23, Rule 1 and 1(1)

Appeal No. : Second Appeal No. 589 of 1964

Appellant : Devassi

Respondent : Anthoni

Advocate for Def. : K. Chandrasekharan,; T. Chandrasekhara Menon and; Thampa

Advocate for Pet/Ap. : K. Kuttikrishna Menon and; A.P. Chandrasekharan, Advs.

Disposition : Appeal dismissed

Judgement :

P.T. Raman Nayar, J.

1. None of the conditions in Sub-section (1) of Section 100 of the Code is here satisfied. Indeed, the dismissal of the appellant defendant's appeal to the court

below can be supported on the short ground that that appeal did not lie. This is a case where the plaintiff withdrew his suit under Sub-rule (1) of Rule 1 of Order XXIII -- he was competent to do that and required nobody'spermission since he was the sole plaintiff, the defendant, as we shall presently see being in no sense a plaintiff -- and the so-called dismissal of the suit as withdrawn by the trial Court was not really a dismissal but a mere recording of the fact of withdrawal It determined none of the matters in controversy in the suit -- there was no claim by the defendant to be determined -- and is not a decree as defined by Section 2 (2) of the Code. It stands on the same footing as a dismissal under Rule 8 of Order IX which, because the word, 'dismissal' implying a determination on the merits is used by the Rule, is expressly excluded from the definition in Section 2 (2) by Clause (b) of the exclusions therein. It is the provision in Sub-rule (3) of Rule 1 of Order XXIII (like that in Rule 9 of Order IX) and not any principle of res judicata that precludes the plaintiff in such a case from bringing a fresh suit in respect of the same matter. It follows that there being no decree no appeal lay under Section 96 of the Code. Reference may be made in this connection to Kulandai v. Ramaswami, AIR 1928 Mad 416 at p. 418, Saraswati Bala v. Surabala Dassi, AIR 1957 Cal 57 and Raisa Sultana Begam v. Abdul Qadir, AIR 1966 All 318 at p. 320.

2. The suit was for an account of a dissolved partnership. By his writtenstatement the defendant denied the partnership alleged in the plaint, and denied that there was any accounting relationship between himself and the plaintiff. Nor was there any finding by the Court that there was any such relationship. Hence, there is here no question of regarding the defendant and the plaintiff as occupying the position of both plaintiff and defendant on the principle underlying the decisions in Debi Chand v. Parbhulal. AIR 1926 All 582, Arura Mal v. Makhan Mal, AIR 1930 Lah 725 and Devsey Khetsey v. Hirji Khairaj, AIR 1942 Bom 35 any more than a defendant in a suit for partition who has claimed sole and exclusive title to the property can be regarded as a plaintiff unless and until the Court has found that the property is liable to partition. See in this connection Hasan Badsha v. Raziah Begum, AIR 1949 Mad 772 and Hulas Rai v. K. B. Bass & Co. Ltd., AIR 1963 All 368.

3. It is said that there was a previously instituted suit between the same parties in which the partnership averred by the plaintiff and denied by the defendant in the present suit has been found and that the defendant has suffered that finding to become final so that it will operate as res judicata in the present suit and rule out his defence that there was no such partnership. Further, that pending disposal of that earlier suit, the presentsuit had been stayed under Section 10 of the Code. That might well be so, but, so long as the plea of res judicata was not taken in the present suit and a finding obtained that the parties stood in an accounting relationship -- it was not for the Court to take such a plea and give such a finding of its own accord -- and so long as the written statement of the defendant stood as it was and denied the partnership and was not amended so as to admit the partnership and ask for an account, there was no change in the scope and nature of the suit and no question of treating the defendant as occupying the role of a plaintiff as well, or, vice versa, so as to permit of the transposition which the defendant sought, or so as to preclude the plaintiff from withdrawing the suit at his own sweet will and pleasure.

So long as the defendant's plea was that there was no partnership and so long as there was no finding that there was a partnership, how could the defendant be transposed to prosecute a suit which, on his own plea, had to be dismissed? A stay of a suit under Section 10 of the Code does not amount to a consolidation of that suit with the previously instituted suit which might, after all, be pending in another Court, so as to make the decree therein a decree in the stayed suit. It is for the parties to take the plea of res judicata, after the disposal of the earlier suit has resulted in the stay being dissolved and obtain an adjudication thereon. Jai Kishan v. Bajranglal, ILR (1961) 11 Raj 1173 relied upon by the appellant, itself recognises this distinction between a stay and an actual consolidation.

4. No application to amend his written statement was made by the defendant to the trial Court and that being so his application for transposition made on the plaintiff informing the Court of his withdrawal was rightly dismissed even if the suit could be regarded as still pending so as to give that Court jurisdiction to entertain such an application. And, since no appeal lay, there was obviously no question of the lower Appellate Court allowing the application for amendment made to it.

5. I dismiss this second appeal with costs.

6. Leave granted.