

Abraham Vs. Joseph

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Court : Kerala

Decided On : Jan-03-2002

Reported in : AIR2003Ker1

Judge : P.R. Raman, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 1, Rule 10 - Order 23, Rule 1A

Appeal No. : C.R.P. No. 588 of 2000

Appellant : Abraham

Respondent : Joseph

Advocate for Def. : Koshy George, Adv.

Advocate for Pet/Ap. : K. Mathew John,; C.A. Chacko and; Baby Thomas, Adv.

Judgement :

P.R. Raman, J.

1. Petitioner in both these civil revision petitions is the third defendant in O.S. 806 of 1987 on the file of the Munsiff's Court, Kottayam, filed by the first respondent in these revision petitions as plaintiff.

2. The suit is one for a petitioner and mandatory injunction against the defendants for the purpose of the construction of retention wall on the southern side of the property. The first defendant is the father of the revision petitioner herein and the second defendant is his wife. The suit was eventually decreed against which an appeal was preferred by the second respondent herein as A.S. 246 of 1993 and the petitioner herein was the second respondent in that appeal. Petitioner herein was declared ex parte in the said appeal. He filed an application as I.A. 1269/1999 for setting aside the ex parte order. That was filed on 6.12.1999. In para 4 of the affidavit filed in support of the petition, it is averred that the appellant had actually no right over the property and she had already separated from the revision petitioner. Subsequently, the appellant (second respondent herein) filed a memo seeking to withdraw the appeal which came up for consideration on 11.1.2000 on which day, the appeal was dismissed as withdrawn. On the same day, the application for setting aside the ex parte order filed by the petitioner herein was also closed on the ground that the appeal itself has been dismissed as withdrawn. It is against that order that C.R.P. 1870 of 2000 is filed.

3. Subsequent to the dismissal of the appeal as withdrawn as aforesaid, the petitioner herein filed an application as I.A. 50/2000 under Order XXIII Rule 1A of the Code of Civil Procedure seeking to transpose himself as the appellant in the said appeal and seeking permission to continue the proceedings. On 25.1.2000 the said application was dismissed on the ground that the application for restoration filed by him has already been dismissed. In other words, after dismissing the application for restoration, the court has passed an order on the application for transposition also. No revision is filed against the order dismissing the application for restoration of the appeal. However, the petitioner has filed C.R.P. 588 of 2000 as against the order dismissing his application for transposition.

4. Heard both sides. According to the learned counsel for the petitioner, under Order XXIII Rule 1A read with O.I.R. 10 of the Code of Civil Procedure, a defendant or a respondent as the case may be, is entitled to file an application for transposition for transposing himself as the plaintiff or the appellant, as the case may be, even after the dismissal of the proceedings - whether it be an appeal or

suit. Order XXIII Rule 1A is extracted hereunder:

'When transposition of defendants as plaintiffs may be permitted - Where a suit is withdrawn or abandoned by a plaintiff under Rule 1, and a defendant applies to be transposed as a plaintiff under Rule 10 of Order 1, the Court shall, in considering such application, have due regard to the question whether the applicant has a substantial question to be decided as against any of the other defendants'.

5. Revision petitioner contends that the right to file an application for transposition arises either when the plaintiff abandons the suit or when the suit is withdrawn. According to him, even after withdrawing the suit, the section contemplates and permits transposition of the defendant as a plaintiff. He also relies on the decision reported in *Ramakrishnan v. Thanka* (2000 (3) KLT 886) in support of his contention.

6. On the other hand, the learned counsel appearing for the respondents submits that the provision contained in Order XXIII Rule 1 read with Order I Rule 10 C.P.C. applies only to a suit and it only gives right to the defendant to be transposed as a plaintiff in the suit and here, since the appeal is not filed by the plaintiff but one of the defendants in the case, the provision has no application. He has also submitted that since the application for restoration of the appeal having been dismissed by the Court below and in the absence of any challenge against that order and the same having become final, the contention of the petitioner that his application for transposition is entitled to be considered, does not merit consideration.

7. Even though Order XXIII Rule 1A and O.I Rule 10 C.P.C. refers to the expression 'suit' and the 'plaintiff', it cannot, for that reason, be sought to restrict the application of the provision to a proceeding in a suit alone since the appeal is the continuation of the proceedings of the suit and in the absence of any separate provision to deal with such a situation it has to be held that the principles contained under Order XXIII Rule 1A and Order I Rule 10 must apply to the proceedings in appeal as well. In this connection, reliance was placed on the decision of the Madras High Court in *Govinda Iyer v. Kumar* (AIR 1980 Madras 232) wherein it has been held that by virtue of Section 107 and Order XXIII Rule

1A the Court can transpose a respondent as appellant when the appellant seeks to withdraw or abandon the appeal. A similar contention was raised by the contesting respondents in that case. It was contended that Order XXIII Rule 1A of the Code of Civil Procedure will apply only to a suit and not to a Second Appeal. However, repelling the contention the court held that in view of Section 107 CPC procedural provision applicable to suits can also be applied to appeals or second appeals as far as it is practicable. In such circumstances, it was held that a court has power to transpose the respondent as appellant in suitable cases when the appellant seeks to withdraw or abandon the appeal. Hence the application filed by the petitioner herein for transposing himself as an appellant cannot be rejected on the mere ground that the application was filed in an appeal and not in a suit, since as already observed above, the provisions of Order XXIII Rule 1A read with Order I Rule 10 C.P.C. will apply to a proceeding in appeal as well. A respondent in an appeal is entitled to seek himself to be transposed as an appellant, if he satisfies the conditions otherwise.

8. The next question to be considered is as to whether the conditions prescribed under Order XXIII Rule 1A read with Order I Rule 10 is satisfied in this case? Admittedly, the appeal was dismissed as withdrawn. As per Order XXIII Rule 1A when a plaintiff abandons or withdraws the suit, the right to apply for transposition arises. In the case of an abandonment of the proceedings, it is a matter to be inferred by the conduct of the party, whereas withdrawal is an act expressly done on an application or otherwise. As held by this Court in *Madhavan Pillai v. Vasu Pillai* (1989 (1) KLT 168) the term 'withdrawn' and the expression 'abandoned' are used alternatively, therefore, the conditions prescribed for invoking the provision is satisfied in this case.

9. The only other question is whether the petitioner can file such an application after the dismissal of the appeal?

10. As could be seen from the provision itself, the word used is 'when the suit is withdrawn or abandoned'. Further, in *Ramakrishnan v. Thanka* (2000 (3) KLT 886) where a similar situation arose and where the suit was dismissed for non prosecution or because it was abandoned, the application for transposition was

filed thereafter, this Court held that in such a situation, the provision under Order XXIII R. 1-A can be invoked by the defendant for transposing himself to be a plaintiff and to continue the proceedings. That was also a case where this Court held that by virtue of the powers under Section 151 C.P.C. when a suit is dismissed as withdrawn and if the Court is satisfied that the defendant can be allowed to be transposed himself as a plaintiff the application is to be allowed necessarily. The court has got the power to restore the suit itself to file to protect the interest of justice. Hence the fact that the appeal was dismissed as withdrawn does not in any way inhibit the right of the petitioner herein to apply for transposing himself to be the appellant in the case.

11. Since the court below has dismissed his application merely on the ground that the application for restoration was dismissed and not on merits, it is not necessary for me to go into the merits or otherwise of the case since the question as to whether the petitioner herein is entitled for such restoration or not as to be considered on merits. But the fact that the appeal stands dismissed as withdrawn, as I have already stated, will not stand in the way of the petitioner in invoking such right of transposition. If the court below on such consideration finds that the revision petitioner is entitled to transpose himself as an appellant, in the interest of justice, the court below will restore the appeal to file so as to enable the revision petitioner to prosecute the same.

12. C.R.P. 1870 of 2000 does not call for a separate order. If the petitioner succeeds and if he is permitted to transpose himself as an appellant, then as held by this Court in *Madhavan Pillai v. Vasu Pillai* (1989 (1) KLT 168) even a party who is declared *ex parte* is entitled to invoke such a right under Order XXIII Rule 1A. Whatever it be once an application for transposition is allowed it will not be necessary to set aside the order declaring him *ex parte* because his right thereafter is that of an appellant to prosecute the matter.

13. The civil revision petitions are disposed of as above. The order impugned is set aside and the matter is remitted to the court below for fresh consideration of the application for transposition filed by the petitioner herein as I.A. 50 of 2000.

f In the circumstances, there will be no order as to costs.

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