

Kokila and Another Vs. K.S. Bhoopathy and Five Others

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Court : Chennai

Decided On : Aug-21-1998

Reported in : 1998(3)CTC16

Judge : C. Shivappa, J.

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

Appeal No. : S.A. No.807 of 1996 and C.M.P. Nos.7569 of 1996 and 1085 of 1997

Appellant : Kokila and Another

Respondent : K.S. Bhoopathy and Five Others

Advocate for Def. : Mr. T. Murugamanikkam,;Mr. V. Rengapashyam, Advs.

Advocate for Pet/Ap. : Mr. M.M. Sunderesh, Adv.

Disposition : Appeal closed

Judgement :

ORDER

1. The petitioners in C.M.P. No. 1085 of 1997 filed a suit for permanent injunction, restraining the respondents from installing machineries to prevent nuisance and also for exclusive usage of pathway shown in red colour in the plaint plan. The suit was decreed in the Court of first instance and on appeal by the respondents in A.S. No.95 of 1993, the decree was modified and a finding was given that the

disputed pathway is common to both. Being aggrieved by the order of the appellate court, the Second Appeal No. 807 of 1996 has been filed by the plaintiffs as appellants.

2. During the pendency of the second appeal, after arguing the case for some time, the learned counsel for the appellants submitted that the appellants may be permitted to withdraw the suit, with a liberty to file a fresh suit as to the title and the consequent cloud over the same absolute exclusive title to his pathway cannot be considered much less granted in the bare injunction suit without the prayer for declaration. It is also averred that by mistake a prayer for declaration was not sought for in the lower court. The respondents also did not raise the said plea in the written statement, much less, before the appellate court and the main grievance is that a suit for declaration is essential in order to show that the suit pathway is situated within the land owned by the appellants.

3. The respondents resisted the withdrawal and contended that the appellants are not the owners of the same nor have they got the proprietary right therein, and if permission is granted to withdraw the suit with a liberty to file a fresh suit, it will cause greater prejudice affecting the right vested in the respondents.

4. Both the learned counsel have relied on several decisions of this Court and other High Courts. Since the position of law is well settled on this aspect, it is not necessary to swell this order by referring to all those judgments. Suffice it to say that the words 'sufficient grounds' would cover a wider field and not restricted to 'formal defect' or 'similar defect'. The test in such a situation will be whether the court is justified in depriving the defendant of the benefit of a finding rendered in his favour after a full trial? It is well known that when the court grants leave to file a fresh suit, the withdrawn suit has no existence in the eye of law and the parties are relegated to the same position which they occupied before the suit was brought. But, one fact situation has to be remembered in this case, viz., that it was the appellants who succeeded in the trial court in obtaining a decree and in the appeal against such decree by the respondents, which was partly allowed, the appellate court found that the pathway was common to both the parties, but the right was not gone into, title was not determined. In such a situation, withdrawal of the suit at the

appellate stage although it may amount to withdrawal or nullification of the appellate Court's order, still not hurt any party other than the withdrawing plaintiffs, because they are also having the right to use the common pathway and the decree preventing installation of the machinery is nullified. Therefore, the contention that withdrawal will prejudice the respondents, has no basis. The apprehended prejudice can be safeguarded by keeping the right to use the pathway by both the parties till the disposal of the suit.

5. In *T.K. Prabhawati v. C.P. Kunhathabi Umma*, A.I.R. 1981 Ker. 179, the Kerala High Court took the view that the wider discretion granted to the court under clause (b) of Order 23 Rule 1 (3) of the Code of Civil Procedure, to examine the sufficiency of the grounds urged in support of every request for withdrawal is intended to advance the cause of justice. Failure of the plaintiff to sue on the strength of title was a mistake and the mistake was 'sufficient ground' within the meaning of Order 23, Rule 1 (3) (b), C.P.C. justifying grant of permission to withdraw.'

6. Even in *Kamayya v. Papayya*,, A.I.R. 1918 Mad. 1287, Spencer, J. had observed thus:-

'In the present case the permission was granted in order to permit the plaintiff to redraft their plaint in such a manner as to contain certain necessary allegations for indicating more clearly what their father's title was, and this appears to me to be a good ground for the order in the circumstances of the case.'

7. In *Baniram v. Gaiind*, : AIR 1982 SC789 , the Supreme Court held thus:

'Having considered the fact that non-pleading of a point may prove a technical impediment and may result in the dismissal of the appeal which may impede a fresh adjudication if a point is to be made though belated, the Supreme Court considers it just and proper in the interests of justice to permit the appellant-plaintiff to withdraw the suit with liberty to file a fresh suit on the same cause of action or on a different cause of action, subject to the payment of Rs. 1,000 by way of costs in addition to all other costs.'

8. In view of this settled position, it is appropriate to permit withdrawal of the suit with a liberty to file a fresh suit for declaration of title which they ought to have done at the initial stage. By withdrawal, the respondents should not be deprived of the benefit of usage of that passage till the final adjudication. If there are valid defences, they can raise all such defences. For the lapses on the part of the appellants, since the respondents had to face the ordeal once again, of course, for a considerable time, it is appropriate to award a cost of Rs.2,000 to be deposited by the appellants before filing of a fresh suit, payable to the respondents. With the above observation, the C.M.P. No. 1085 of 1997 seeking permission for withdrawal of the suit, is allowed and the appellants are permitted to withdraw the suit with a liberty to file a fresh suit for declaration on the same cause of action.

9. In view of the order passed in the above C.M.P., no separate order is necessary on the second appeal and the same is therefore closed. Consequently, C.M.P. No.7569 of 1996 is also closed.