



**IN THE COURT OF THE ADDITIONAL CIVIL
JUDGE AND JMFC, AT PERIYAPATNA**

Present: **Smt.Shwetha.J.** *B.com., L.L.B.,*
Addl. Civil Judge & JMFC

Dated this the 14th day of August 2023

O.S.No.160/2020

PLAINTIFF : KRISHNEGOWDA
V/s.,
DEFENDANTS : THAMMEGOWDA
AND OTHERS

IA.No.IV TO VI

**APPLICANT/
DEFENDANTS No.5** : RANI
[By Adv. Sri.HNU.,]
V/s.,
**OPPONENT/
PLAINTIFF** : KRISHNEGOWDA
[By Adv. Sri.KRK.,]

**COMMON ORDERS ON MEMO, IA.NO.IV, IA.NO.V
AND IA.NO.VI**

The Memo filed by the plaintiff seeking permission to dismiss the suit. Whereas IA.IV is filed u/O IX Rule 9 of CPC and IA.VI is filed u/O I Rule 10(6) r/w Sec.151 CPC to transpose her as plaintiff No.2.

2. In the Memo, the plaintiff has mentioned that plaintiff and defendants have settled the matter out of the Court, therefore prayed to dismiss the suit as not

pressed. Per contra, the counsels for defendant Nos.5, 6 and 9 have orally objected that the matter is not compromised between the parties and prayed to reject the prayer.

3. The defendant No.5 has filed IA.IV u/O IX Rule 9 of CPC seeking permission to set aside the exparte order passed against her as she intends to contest the suit. She further stated that since she underwent treatment for Jaundice, she was not aware of the proceedings and the plaintiff has sent the summons to Chowthigrama instead of Hunasavadi where she has been residing for the past 5-6 years. Hence, prayed to allow the application.

4. The defendant No.5 has also filed IA.V u/O XXXIX Rule 1 and 2 of CPC seeking temporary injunction restraining the Tahsildar, Periyapatna to not to change Katha in respect of suit properties in favour of others till disposal of suit. It is stated that the plaintiff and other defendants have created some documents and on the basis of the same, they are trying to get change the Katha. In spite of the same, the Revenue

officials are insisting them to get injunction order from the Court to stop the change of Katha. Hence, prayed to allow the application.

5. The defendant No.5 has also filed IA.VI u/O I Rule 10(6) r/w Section 151 CPC seeking permission to transpose her as the plaintiff. It is stated that though the plaintiff has admitted the share of the defendant No.5 in the suit, behind her back, without her consent, along with other defendants has created the documents to change the Katha into their names. It is further stated that the suit is for partition, she has got share in the suit properties and that the plaintiff in collusion with other defendants intends to dismiss the suit, she intends to transpose her as plaintiff from the defendant. On all these grounds prays to allow the said application.

6. Per contra, the plaintiff has filed common objections to IA.IV and V denying the contents of said IAs and further contended that since three years, the defendant No.5 has intentionally remained absent before the Court and hence this Court has placed her as exparte. If at all the defendant No.5 has right over the

suit property, she would have filed separate suit. That the plaintiff has compromised the matter out of the Court and got his share. That after said compromise, the defendant No.5 in order to cause injury to the plaintiff has filed the present applications. Hence, prayed to dismiss IA.IV and V. Whereas in the objections filed to the IA.VI, the plaintiff has contended similar objections as contended in the objections filed to the IA.IV and V.

7. On the basis of the above rival pleadings, the following points arise for consideration:

1. Whether the Memo is required to be allowed?
2. Whether the IA.IV filed u/O IX Rule 7 of CPC is required to be allowed?
3. Whether the IA.V filed u/O XXXIX Rule 1 and 2 of CPC is required to be allowed?
4. Whether the IA.VI filed u/O I Rule 10(6) of CPC is required to be allowed? Whether the IA No.XIII filed u/O XXVI Rule 9 r/w Sec.151 CPC is deserves to be allowed?
5. What order?

8. My findings to the above points are hereunder;

Point No.1: In the Negative,

Point No.2: In the Affirmative,

Point No.3: In the Negative,

Point No.4: In the Affirmative,

Point No.5: As per final order for the following;

REASONS

9. POINT Nos.1, 2 and 4 : Admittedly, the suit is filed by the plaintiff seeking relief of partition and separate possession of his share in the suit properties. When the case posted for taking steps against the deceased defendant No.10, he has moved memo to dismiss the suit as not pressed as the matter is settled between the parties to the suit. But the defendant No.5 has orally objected for the same stating that no such settlement came to be entered into between the parties.

10. Nodoubt, in this suit, some of the parties are placed exparte, some of the defendants said to be dead. The plaintiff has simply filed memo stating that the matter is settled between the parties and not produced any document with whom the matter is amicably settled. On the other hand, the defendant No.5 who intends to contest the suit, has strongly opposed the said settlement.

11. Nodoubt, if the plaintiff files Memo for dismissal of suit as not pressed, it is an absolute right

of the plaintiff which cannot be denied, but the plaintiff further contends that the matter is settled between the parties, which was orally objected by counsel for defendant No.5, 6 and 9. In a suit for partition, it stands on different footing wherein the plaintiff is to be treated as defendant and defendant is to be treated as plaintiff. If the plaintiff seeks dismissal of the suit in partition case, he ought to have served a notice to all the defendants and if all the defendants objects for the same and if the defendants also sought for their share in written statement in which he adversely claims his interest also in the suit properties as a plaintiff against other defendants, then the plaintiff cannot be permitted to withdraw a suit in such a case. He is said to have seeking relief for himself not only against the plaintiff, but also against the other defendants.

12. But a suit for partition stands on a different footing wherein the plaintiff is to be treated as defendant and defendant is to be treated as plaintiff. If the plaintiff intends to withdraw a suit in partition case, he ought to have served a notice to all the defendants

and if all the defendants consents for the said application for the withdrawal, then the plaintiff has no difficulty in withdrawing the suit. But if the defendants objects for the same and if defendants also sought for their share in written statement in which he adversely claims hi interest also in the suit properties as a plaintiff against other defendant, then the plaintiff cannot be permitted to withdraw a suit in such case.

13. He is said to have seeking relief for himself not only against the plaintiff, but also the other defendants.

14. The question whether a defendant seeking a share is also in the position of a plaintiff and whether the original plaintiff cannot there withdraw the suit without the consent of the defendants, who is in the position of the plaintiff is discussed in a decision of Tukaram Mahadu Tandel Vs. Ramachandra Mahadu Tandel where, Bombay High Court held that-

“But there are other and wider considerations which lead me to hold that plaintiff could not have withdrawn so as to defeat the defendants’ claim. It is relevant to point out that in a partition

suit a defendant seeking a share is in the position of a plaintiff and one plaintiff cannot withdraw without the permission of another”

15. The Hon'ble High Court of Karnataka deals with the issue that Whether in a partition suit, the plaintiff can be permitted to withdraw the suit, or whether a suit can be dismissed as settled out of the Court between plaintiff and some of the defendants, when other defendants have also sought partition and separate possession, in the decision of Smt. Gowramma Vs Nanjappa and other. Rendered by Justice Ravidran by referring to the decisions of various High Courts.

16. When a suit for partition is filed, by a member of a family, he expresses his unequivocal intention to separate himself from the joint family and consequently there is a severance of joint family status from the date of suit. A suit for partition is invariably brought in respect all the joint family properties. Every person(including female members) who is entitled to a share on partition is impleaded as plaintiff or defendant, having regard to the fact that any decree which gives a

property or a portion of a property to a plaintiff, takes away the right of the other members in that property or portion of the property, and non – impleading of the necessary parties will lead to its dismissal. (Where however partition is claimed branch-wise by any particular branch, it may be sufficient if the heads of all the branches are made parties.) In a suit for partition, each defendant is entitled to seek partition and separate possession of his share by paying the specifically prescribed Court fee for such purpose. When a plaintiff seeks partition, he is seeking partition not only against the defendants but also against his co-plaintiff, if any. Similarly when a defendant seeks partition, the relief is sought not only against the plaintiffs, but against the co-defendants also. In other words, each party to a suit for partition, whether a plaintiff or defendant, who seeks the relief of partition and separate possession by paying separate court fee, is in the position of plaintiff with reference to all other parties to the suit. When a defendant seeks partition and separate possession of his share, in a suit for partition filed by a plaintiff, the

defendant's claim is neither a set off nor a 'counter-claim' against the plaintiff in the traditional sense, but is one of a wider scope. The Karnataka Court Fees and Suits Valuation Act, 1958 treats a counter-claim 8 and 35(3) respectively and prescribes different types of court fee. Therefore, when the defendants in a suit have paid separate court fee and sought partition and separate possession of their shares also, the suit cannot be dismissed as withdraw or settled out of Court by plaintiff with other defendants.

17. The procedure to be adopted by courts in a partition suit, when a plaintiff wants to withdraw the suit, or when plaintiff wants the suit to be dismissed as settled out of Court with some defendants, can be summarized thus;

(2) If all parties are agreeable for the dismissal or withdrawal, the court may grant the request.

18. In view of the principle emerging from the above said decisions, applying the same principle to the case on hand, defendant No.10 also sought for her 1/9th share in the suit properties not only against

plaintiff but also against other defendants and sought for transposition as a plaintiff by opposing an application of withdrawal filed by a plaintiff, then the plaintiff cannot be permitted to withdraw a suit. If she is not interested to continue the suit, then she can utmost be transposed as a defendant. ***Accordingly, point No.1 is answered in the Negative, point Nos.2 and 4 in the Affirmative.***

19. Point No.3: So far as this point is concerned, this point is framed on the basis of IA.V filed u/O XXXIX Rule 1 and 2 of CPC. In this IA, the defendant No.5 has sought to restrain the Tahsildar by way of temporary injunction from changing Katha into the names of others in respect of suit property as the plaintiff along with other defendants, behind the back of defendant No.5 and creating some documents, has made an application for change of Katha. Against this application, the plaintiff has filed objection stating that the defendant No.5 has intentionally remained absent for 3 years, hence this Court has treated her exparte. Now after amicable settlement of the matter, in order to

harass the plaintiff and with an intention to drag the proceedings, has filed this frivolous application.

20. In order to consider this application, the party who seeks the temporary injunction has to satisfying the three ingredients i.e., prima-facie case, balance of convenience lies in whose favour who seeks the relief and also causing him injuries in the event of rejection of application. Apart from this, he has to satisfy the grounds as envisaged under Order XXXIX Rule 1 and 2 of CPC. When this application is filed, the party who is seeking as a defendant. As per the said provision, the defendant can claim the relief only as per Rule 1(a) of Order XXXIX of CPC which dealt with “(a) that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree,”. Therefore, it is not the case of defendant No.5 that the suit properties are in danger of being wasted, damaged or alienated by any party to the suit, the claim of the defendant No.5 that to direct the Tahsildar to not to change Katha. It is also pertinent to note that there is a

clear cut bar of jurisdiction of the Civil Court as per Karnataka Land Revenue Act and it is the Revenue Court shall have jurisdiction to determine, decide or dispose of or decide the Revenue matters. Hence, on these grounds, the defendant No.5 has not made out any grounds to allow IA.5. ***Therefore, point No.3 is answered in the Negative.***

21. POINT No.5: In view of the discussions on point Nos.1 to 4, this Court proceeds to pass the following:

ORDER

Memo is hereby rejected.

IA.No. IV filed u/O IX Rule 7 of CPC and IA.No.VI filed u/O 1 Rule 10(6) r/w 151 CPC are hereby allowed.

IA.No.V filed u/O XXXIX Rule 1 and 2 of CPC is dismissed.

Defendant No.5 is hereby permitted to get herself transpose as the plaintiff and the plaintiff transposed as defendant No.5.

(Dictated to the Stenographer directly on computer, corrected and then pronounced by me in the open court, this the 14th day of August 2023)

(SHWETHA.J)

Addl. Civil Judge and JMFC
Periyapatna

