

HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN

Civil Revision Petition Nos.400 and 453 of 2018

ORDER:

Aggrieved by the dismissal of an application for rejection of plaint under Order VII Rule 11 of the Code of Civil Procedure and also aggrieved by the refusal of the Court below to stay a suit for partition under Section 10 of the Code of Civil Procedure, the 4th defendant, a third party purchaser, has come up with the above revisions.

2. Heard Mr. Nandula Nataraj, the petitioner appearing in person.

3. One Smt. Chinnam filed a suit in O.S.No.264 of 2012 on the file of Senior Civil Judge, Vijayawada, seeking partition and separate possession of her 1/4th share in the suit schedule property. In the suit, the plaintiff namely Chinnam impleaded her mother as the 1st defendant and her brother and sister as defendants 2 and 3. After the institution of the suit, the petitioner herein, who is the third party purchaser, got impleaded as the 4th defendant in the said suit in O.S.No.264 of 2012.

4. It appears that the said suit O.S.No.264 of 2012 was dismissed for non-prosecution and the application under Order IX Rule 9 CPC was also dismissed. However, the plaintiff is stated to have filed a Civil Miscellaneous Appeal along with the application to condone the delay and the same is pending.

5. Thereafter, the 3rd defendant in O.S.No.264 of 2012, who is the sister of the plaintiff in that suit, filed an independent suit in

O.S.No.174 of 2016 for partition and separate possession in respect of the very same property, impleading her mother, brother and sister as defendants 1 to 3 and also impleading the petitioner herein as the 4th defendant.

6. Upon receipt of summons, the petitioner herein/4th defendant took out two applications, one under Order VII Rule 11 CPC and another under Section 10 CPC. Both these applications were dismissed by the trial Court forcing the 4th defendant to come up with the above revisions.

7. The grievance of the petitioner is that once an application under Order IX Rule 9 CPC is dismissed, there is a bar under Order IX Rule 9 CPC to institute a fresh suit and that in any case, when the plaintiff has filed a C.M.A. as against the dismissal of the petition under Order IX Rule 9 CPC, the second suit cannot be proceeded with.

8. But I do not agree. As pointed out earlier, one lady filed a suit as against her mother, brother and sister for partition and allowed the suit to be dismissed for non-prosecution. This does not preclude the other brother or sister or even the mother from filing an independent suit for partition. The rights of a defendant to file a suit for partition cannot be defeated either by the action of the plaintiff in allowing the suit to be dismissed for non-prosecution or by the action of the plaintiff in seeking restoration of that suit.

9. Order XXIII Rule 1A CPC relied upon by the petitioner, is of no assistance, since the said provision applies to cases where there is a threat of the plaintiff not prosecuting the suit diligently. After the

threat comes alive, Order XXIII Rule 1A CPC will have no application.

10. In any case, in a partition suit, the plaintiff is a defendant and the defendant is a plaintiff. Each of the parties to a partition suit, can be treated as a plaintiff and a defendant. One's action cannot defeat the rights of the other. Therefore, the dismissal of the petition under Order VII Rule 11 CPC was perfectly in order.

11. Coming to the dismissal of the petition under Section 10 CPC, it is seen that the suit has not yet been restored to file. Unless the suit is restored to file, it cannot be contended that the former suit is still alive. The pendency of an application to condone the delay in filing the C.M.A. as against the dismissal of an application under Order IX Rule 9 CPC cannot be treated as the pendency of a suit so as to invoke Section 10 CPC. It is only after the delay is condoned, after the C.M.A. is allowed and after the suit is restored to file that the petitioner can think of Section 10 CPC. Therefore, I find no merits in both the revisions.

Hence, the Civil Revision Petitions are dismissed. No costs.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

Date: 02-02-2018

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