

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.6670 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, questioning the order in I.A.No.714 of 2017 in O.S.No.419 of 1999 dated 02.11.2017 passed by the V Senior Civil Judge, City Civil Court, Hyderabad, declining to grant permission to withdraw part of the suit claim i.e. for alternative relief of parititon of schedule property.

The petitioner filed O.S.No.419 of 1999 under Order XXIII Rule I C.P.C to abandon part of the claim i.e. for alternative relief of partition on the ground that the relief of partition was claimed with misapprehension of law and facts, the petitioner is claiming declaration that he is the absolute owner of the suit schedule property and delivery of possession, the question of claiming relief for partition alternatively, does not arise and due to mistake of the counsel, the said relief was claimed in the plaint. Therefore, prayed to grant leave to abandon part of the claim i.e. for alternative relief of partition.

The respondents opposed the petition by filing counter, while contending that, in a suit for partition, both the parties are in the status of plaintiff and defendants are entitled to claim share by the parties and such party cannot be permitted to be withdrawn the claim in a suit for partition. But, the Court upon hearing argument of both the counsel, dismissed the petition on various grounds.

Aggrieved by the order in I.A.No.714 of 2017 in O.S.No.419 of 1999 dated 02.11.2017 passed by the V Senior Civil Judge, City Civil Court, Hyderabad, the present civil revision petition is filed.

During hearing, learned counsel for the petitioner Sri Bankatlal Mandhani contended that, when there is no allegation in the plaint that the suit schedule property is a joint property or coparcenary property, question of division or severance of status and division of property does not arise, since the advocate on misapprehension of fact and law, claimed such alternative relief of partition along with primary relief of declaration and recovery of possession. Therefore, leave can be granted to abandon part of the claim, i.e., alternative relief of partition of suit schedule property. In support of his contention, learned counsel for the petitioner placed reliance on the judgment of the Supreme Court in **Kamal Kant Jain v. Surinder Singh (d) through Lrs**¹.

Whereas, learned counsel for the respondents Sri R A. Achuthanand contended that, in a suit for partition, the plaintiff and defendants are entitled for share therein, in the property and the parties can transpose themselves either as plaintiff or defendant, but the parties cannot be permitted to withdraw the suit for partition and placed reliance on the judgment of the Supreme Court in **Tukaram Mahadu Tandel v. Ramachandra Mahadu Tandel and others**², **Manohar Singh v. Mst. Sardar**

¹ AIR 2017 SUPREME COURT 5592

² AIR 1925 Bombay 425

Bai³, Bangaru Pattabhiramayya v. Bangaru Gopalakrishnayya⁴

to contend that, suit for partition cannot be withdrawn.

Upon hearing both the parties, this Court called for the issues from the Trial Court to verify whether any issue was framed with regard to grant of alternative relief of partition.

Considering rival contentions, perusing the material available on record, the point that arises for consideration is: **“Whether the petitioner is entitled to abandon part of the claim i.e., alternative relief of partition vide Clause (5) of the relief portion in the plaint by invoking Order XXIII Rule 1 C.P.C.?”**

P O I N T:

On a bare look at the pleadings in the plaint, virtually the claim of the plaintiff is for declaration of title and recovery of possession and other consequential reliefs. But, for the reasons best known for the plaintiff, the plaintiff claimed alternative relief of partition of suit schedule property without claiming any particular share in the property in dispute. When the suit is for partition, the question of granting permission to abandon part of the claim does not arise. However, the Division Bench of this Court in **Bangaru Pattabhiramayya⁴** case, it is made clear that, a suit for partition cannot be permitted to be withdrawn, as either of the parties, i.e. either plaintiff or defendant are entitled to claim share,

³ AIR 1987 RAJASTHAN 177

⁴ AIR 1986 ANDHRA PRADESH 270

being coparceners or joint owners. In the said judgment, the Division Bench of this Court relied on earlier judgments of Apex Court and on the strength of the principles laid down in the judgments, learned counsel contended that, there are two exceptions for granting permission to withdraw or abandon the claim or part of the claim, where the Court laid down two exceptions under which the plaintiff's right to withdraw his suit cannot be exercised absolutely. One is the case where a set-off was pleaded under Order VIII C.P.C and another is a case where a counter-claim had been filed. The mentioning of these two exceptions by the Supreme Court would show that the language of Order XXIII Rule 1 C.P.C is not intended to be given its literal meaning. If, set-off or counter-claim is read as a limitation operating on the language of Order XXIII Rule 1, sub-clause (1), equally the other provisions of C.P.C , such as Order I Rule 10 or even other statutory provisions contained in the Limitation Act.

In **Manohar Singh³** case, the Rajasthan High Court held that, the position in a suit for partition of immovable property filed by a joint coparcener stands on a different footing altogether. In such suit for partition of immovable property even the defendants have the same right to claim partition and it is not material as to in what manner the parties are arrayed as plaintiffs or defendants in the suit. Even the defendants can be transposed as plaintiffs and can continue the suit if they feel that the plaintiff is not continuing the suit in their interest. Thus in such kind of suit no absolute

right can be held in favour of the plaintiff of withdrawing a suit under Order 23, Rule 1, C.P.C.

The Rajasthan High Court relied on the judgment of the Supreme Court in **R. Ramamurthi v. Rajeshwararao**⁵, wherein, in-turn reliance was placed reliance on the following observations in **Tukaram Mahadu Tandel v. Ramchandra Mahadu Tandel**⁶ :--

"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 (Order XXIII, Rule 1(4))."

It was further observed as follows:

"It has further been emphasised that in a partition suit the plaintiff is not wholly dominus lit is and even on the assumption that Section 3 confers a privilege or an option on the shareholder who is a defendant in a suit for partition the plaintiff is debarred from defeating the exercise of that privilege or option by resorting to the device of withdrawing a suit under Order 23, Rule 1."

"Apart from these considerations it would also enable the plaintiff in a partition suit to withdraw that suit and defeat the defendant's claim which according to Crump J. cannot be done even in a suit where the provisions of the Partition Act have not been invoked."

Thus, the law is consistent that, a suit for partition cannot be permitted to be withdrawn. The Trial Court also framed an issue with regard to entitlement of the petitioner to claim alternative relief of partition and separate possession. (vide issue No.7). When the issue is framed, though, the learned counsel for the petitioner

⁵ AIR 1973 SC 643

⁶ AIR 1925 Bom 425

contended that, when there is no denial of alternative relief of partition, the suit cannot be treated as a suit for partition. Here, this issue has to be decided by the Trial Court subject to adducing evidence by both the parties on the issue. Therefore, as on today, alternative relief of partition was claimed by the petitioner in the suit and an issue was framed by the Trial Court pending for adjudication before the Trial Court. But, the parties have to adduce evidence, based on their pleadings. Hence, the Trial Court is directed to confine to the pleadings and evidence on record and record findings on the issues. If, for any reason, no evidence is adduced regarding entitlement to claim alternative relief of partition, the Trial Court can dismiss the alternative relief of partition.

Learned counsel, though relied on the judgment of the Apex Court in **Kamal Kant Jain**¹, the judgment has no application, since it relates to suit for specific performance, which is on different footing than the suit for partition.

With the above direction, the civil revision petition is disposed of.

Consequently, miscellaneous applications pending if any, shall also stand dismissed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:01.02.2018

Note: copy by 19.02.2018
b/o
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