IN THE HIGH COURT OF JUDICATURE AT HYDERABAD FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

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CIVIL REVISION PETITION NO.4508 OF 2016

Between:

N.Savithri and others .. Petitioners

and

N.Hanmappa and others .. Respondents

DATE OF THE ORDER PRONOUNCED: 28.10.2016

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE SANJAY KUMAR

1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No

2. Whether the copies of judgment may be marked to Law Reporters/Journals Yes/No

3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

*** THE HON'BLE SRI JUSTICE SANJAY KUMAR**

+ CIVIL REVISION PETITION NO.4508 OF 2016

% DATED 28th OCTOBER, 2016

\# N.Savithri and others .. Petitioners

Vs.

$ N.Hanmappa and others .. Respondents

<Gist:

>Head Note:

! Counsel for the Petitioners : Sri Suresh Bhaktula

^Counsel for the Respondents : --

? CASES REFERRED:

1. 2000 (2) ALD 754 (D.B.)
2. 2004 (1) ALD 539
3. 2005 (3) ALT 98
4. 2006 (5) ALT 57

THE HON'BLE SRI JUSTICE SANJAY KUMAR

CIVIL REVISION PETITION NO.4508 OF 2016

O R D E R

The plaintiffs in O.S.S.R.No.1359 of 2016 on the file of the learned Senior Civil Judge, Vikarabad, Ranga Reddy District, are in revision under Article 227 of the Constitution aggrieved by the docket order dated 19.08.2016 passed by the trial Court requiring them to pay *ad valorem* court fee under Section 34(1) of the Andhra Pradesh Court Fees and Suits Valuation Act, 1956 (*for brevity*, 'the Act of 1956').

As the suit is yet to be numbered and has not even been taken on file by the trial Court, there is no necessity for this Court to give an opportunity of hearing to the respondents, the defendants in the said suit, at this stage.

Heard Sri Suresh Bhaktula, learned counsel for the petitioners/plaintiffs.

The suit, O.S.S.R.No.1359 of 2016, was filed before the learned Senior Civil Judge, Vikarabad, Ranga Reddy District, for partition and separate possession of the suit property, being an extent of agricultural land admeasuring Ac.3.28 guntas situated in Sy.No.229/ఈ of Tandur Village and Mandal, Ranga Reddy District, and house property bearing Door No.8-2-39, situated at old Tandur, Tandur Municipality, Ranga Reddy District. The suit plaint reads to the effect that the suit schedule property belonged to one Sayappa, the father of the 1st respondent/1st defendant and was inherited upon his death by the 1st respondent/1st defendant. The 2nd and 3rd respondents/2nd and 3rd defendants and the husband of the 1st petitioner/1st plaintiff are the sons of the 1st respondent/1st defendant. While so, the husband of the 1st petitioner/1st plaintiff died in a road accident, leaving behind the petitioners/plaintiffs as his legal heirs. Claiming that the suit property was ancestral property and still remained joint, the subject suit was filed for partition and separate possession. According to the petitioners/plaintiffs, the 1st, 2nd and 3rd defendants had alienated the agricultural land in favour of the 4th, 5th and 6th defendants with a dishonest and malafide intention and the said alienation, being a sham and collusive one, was not binding on them.

These being the plaint averments, the trial Court was of the opinion that as the sale deeds said to have been executed by the 1st, 2nd and 3rd defendants in favour of the 4th, 5th and 6th defendants recorded that possession was delivered, the question of the petitioners/plaintiffs claiming joint possession did not arise. The trial Court, recording so in its docket order dated 19.08.2016, directed the petitioners/plaintiffs to pay *ad valorem* court fee under Section 34(1) of the Act of 1956.

Section 34 of the Act of 1956, to the extent relevant, reads as under:

'**34. Partition Suits**:--(1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the movable property or three-fourths of the market value of the immovable property, included in the plaintiff's share.

(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property fee shall be paid at the following rates:--

When the plaint is presented to—

(i) a District Munsif Court	Rupees Fifty
(ii) a Subordinate Judge's Court or a District Court.	Rupees one hundred if the value of plaintiff's share is less than Rs.10,000. Rupees two hundred if the value is not less than Rs.10,000.

(3) ……………….'

Section 34(1) of the Act of 1956 would therefore apply to a partition suit where the property is owned jointly but the plaintiff is excluded from the possession of such property. In such a situation, the plaintiff is required to pay the court fee upon the market value of the property concerned. Section 34(2) of the Act of 1956, on the other hand, applies to a partition suit where the property in question is owned jointly and the plaintiff, being in joint possession, seeks partition and separate possession. In such a situation, the court fee is fixed as stipulated thereunder.

It is a settled position of law that at the time of institution of the suit the Court is required to go only by the plaint averments for the purpose of ascertaining the court fee payable. As observed by a Division Bench of this Court in ***A.DIVAKRUPAMANI AND ANOTHER V/s. A.SAKUNTALA DEVI AND OTHERS***[1], at the inception of the suit the trial Court has to go by the recitals of the plaint and only if a challenge is laid by the defendants at a later point of time, the trial Court can frame a triable issue as to whether the suit was properly valued and whether the court fee paid was proper. The Division Bench pointed out that even otherwise the Court is empowered under Section 11 of the Act of 1956 to reopen the issue as to payment of court fee. The Division Bench pointed out that these are stages which would arise later

[1] 2000 (2) ALD 754 (D.B.)

and not at the time of numbering of the suit based on the plaint averments.

Dealing with a similar fact situation, as is arising in the present case, in ***R.V.BHUVANESWARI AND OTHERS V/s. PONNUBOINA CHENCU RAMAIAH (DIED) AND OTHERS***[2], this Court observed that once the plaint averments read to the effect that the alleged alienation by way of a sale deed was sham and nominal and that the alienators had no right to sell the joint family property without there being a division and opined that the question as to whether the possession was joint at the time of the alleged alienation is to be decided after trial of the suit and not at the stage of numbering of the suit by the office of the Court.

Again in ***GUNDSAY SWAROOPA V/s. GUNDSAY BALAIAH***[3], this Court observed that the trial Court, for collection of court fee, has to see the averments made in the plaint as to whether there was a prior partition of the suit schedule property which was stated to be in joint possession. If, upon the defendant's appearance, a plea is taken that there was an earlier partition, it was observed that it would be open to the trial Court to frame an appropriate issue as to valuation of the suit and payment of court fee, but at the stage of presentation of the suit, the plaint cannot be returned on the presumption that there was a prior partition.

In ***MIRZA RAHEEM BAIG V/s. MIRZA MAHAMOOD BAIG AND OTHERS***[4], the suit was filed for partition, separate possession and for cancellation of the registered gift deeds. The trial Court observed that the documents filed showed that the possession of the property was not joint and accordingly directed

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[2] 2004 (1) ALD 539
[3] 2005 (3) ALT 98
[4] 2006 (5) ALT 57

payment of court fee under Section 34(1) of the Act of 1956. This Court held the approach of the trial Court in that case to be wrong, opining that in a suit for partition, the court fee must be determined on the basis of the averments made in the plaint and at that stage the Court is not entitled to travel beyond the plaint averments. This Court held that the finding of the trial Court, basing on the pahanies, that the plaintiff was not in joint possession of the suit property was completely erroneous in law and that such a finding could have been rendered only after the trial of the suit.

Perusal of the docket order under revision reflects that the aforestated three decisions were cited before the trial Court. Notwithstanding the same, the trial Court was of the opinion that the sale deeds said to have been executed by the 1st, 2nd and 3rd defendants showed that possession was delivered to third parties and therefore, the petitioners/plaintiffs could not claim to be in possession. It is therefore manifest that the trial Court did not limit its consideration to the plaint averments but examined the contents and merits of the suit documents. When the petitioners/plaintiffs specifically averred that the alienation effected under the sale deeds was a sham and nominal one and that it was not binding upon them, the trial Court could not have gone by the contents of the said documents to the exclusion of the plaint averments, which read to the effect that the property in question was a joint family property and that without prior partition, the share falling to the lot of the petitioners/plaintiffs had been alienated unlawfully. As to what would be the impact of such alienation on the joint possession claimed by the petitioners/ plaintiffs was a matter which essentially fell for consideration during the trial. The finding of the trial Court at the threshold, while dealing with the valuation of the suit for the purpose of the court fee, that the petitioners/plaintiffs could not claim joint possession therefore effectively decided one of the crucial issues arising for consideration in the main suit. This approach on the part of the trial Court was completely unsustainable in law. As matters stand, going by the plaint averments, the petitioners/plaintiffs were entitled to pay court fee under Section 34(2) of the Act of 1956. However, as observed by this Court in the judgments cited *supra* the power under Section 11 of the Act of 1956 would be available to the trial Court and in the event the issue of valuation of the suit and payment of proper court fee thereon arises at a subsequent stage, the trial Court would always be at liberty to take recourse to use of such power.

Subject to the above observation, the civil revision petition is allowed. The trial Court is directed to accept the court fee on the subject suit under Section 34(2) of the Act of 1956 and proceed in the matter accordingly. Pending miscellaneous petitions shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

28th OCTOBER, 2016

<u>Note:</u> L.R. copy to be marked
B/o Svv