

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1406 of 2015

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful petitioners/defendants 7 to 11 is directed against the orders, dated 30.01.2015, of the learned Special Sessions Judge for SC & ST (POA) Act, 1989-cum-VII Additional District Judge, L.B.Nagar, Ranga Reddy District, passed in I.A.no.3494 of 2014 in O.S.no.1271 of 2014 filed under Order VII Rule 11 read with Section 151 of the Code of Civil Procedure, 1908, (hereinafter, 'Code') requesting to reject the plaint.

2. I have heard the submissions of the learned counsel for the revision petitioners/defendants 7 to 11, the learned counsel for the 1st respondent/plaintiff and the learned counsel for the respondents 4 to 7/defendants 3 to 6. I have perused the material record. The parties in this revision shall hereinafter be referred to as the plaintiffs and the defendants for convenience and clarity.

3. To begin with, it is to be noted that the plaintiffs brought the suit against the defendants for the following reliefs:

“ a) Preliminary Decree for 1/5th share, out of 1/2 share of the suit schedule property A, B and C in favour of plaintiff which is equal to 653.4 Sq. yards., in schedule property D

b) Final Decree be passed in compliance to the preliminary decree by appointing a Commissioner to divide the suit schedule property D with metes and bounds and also separate possession be delivered in favour of the plaintiff.

c) By putting the plaintiffs in vacant physical possession of the suit schedule property by evicting the defendants No.7 to 11 thereby removing the structures from the suit schedule property

d) To declare the following sale deeds are not binding on the plaintiff and subsequent documents thereon

i) Sale deed No.7954 of 1998 Dt.15-10-1998

ii) Sale deed No.7955 of 1998 Dt.15-10-1998

- iii) Sale deed No.7697 of 1998 Dt. 08-10-1998
- iv) Development Agreement cum GPA 14133 of 2013
Dt: 19-9-2013

e) Award costs of this suit and pass such other order and further relief or reliefs as are deemed fit and proper in the circumstances of the case and in the interest of justice.”

[Reproduced Verbatim]

The relationship, which is not in dispute, is this: ‘Jeediginjala Manne Mallaiah @ Talari Mallaiah is the husband of late Manne Manemma. The plaintiff, the defendants 1 & 2 and one late J.M.Shankar are the children of the said Mallaiah and Manemma. The defendants 3 to 6 are the legal heirs of the deceased Shankar.’ Some of the defendants are resisting the suit. While so, the defendants 7 to 11 filed the aforementioned application seeking rejection of the plaint. That interlocutory application was resisted by the plaintiff. At the time of enquiry before the trial Court, no oral and documentary evidence was adduced by either of the parties. On merits and by the order under revision, the trial Court had dismissed the said petition. Therefore, the defendants 7 to 11 had filed this revision petition.

4. The case of the defendants 7 to 11 in support of their request for rejection of the plaint as stated in the supporting affidavit of the 9th defendant, in brief, is as follows:

The plaintiff brought the suit for partition and allotment of a half share out of the 1/5th share out of the suit schedule properties to her, i.e., 653.40 square yards in the plaint ‘D’ schedule property and to grant a preliminary decree and a consequential final decree and put her in possession of the said separated share after evicting the defendants 7 to 11 there from and also to declare that the three sale deeds and the development agreement as not binding on her. The plaintiff accepted her relationship and also of the defendants 1 to 6 with Talari Mallaiah and his wife Manemma. The relationship is admitted and is not in dispute. Indeed, Talari Mallaiah and Sathaiah are

brothers. The said Sattaiah is having a half share in the property covered by Sy.nos.68/ A and 68/ AA. The said Sattaiah is having two sons, J.M.Venkatesh and J.M.Sreenivas. Sathaiah along with his sons sold away the entire extent of land in Sy.nos.68/ A and 68/ AA, i.e., Ac.1.14 guntas by way of registered sale deeds bearing document nos.7954 of 1998, 7955 of 1998 and 7697 of 1998. The said fact is accepted by the plaintiff in her plaint. It is also admitted that the plaintiff and the other members of her family are Hindus and are governed by Mitakshara law of succession. Section 6 of Hindu Succession Act, 1956, (as amended) (hereinafter, 'the 1956 Act') states that the daughter of a family governed by Mitakshara Law of succession is eligible for a share on par with a son. However, if the property is alienated on or before 20.12.2004, a daughter of such family is precluded from claiming any share in the family property on par with a son of the family. Since the property was alienated in the years 1997 and 1998 and as the said fact is undisputed, the suit as per admitted facts and the settled law is not maintainable and is liable to be dismissed. The suit is filed with ill intentions to extract monies. The suit is in the nature of vexatious litigation. Hence, the suit is liable to be dismissed as not maintainable.

5. *Per contra*, the case of the plaintiff in her counter affidavit and the submissions made on her behalf, in brief, are as follows:

The petition filed by the defendants is not maintainable under facts and in law and is liable to be dismissed. Defendant no.9 alone filed the affidavit on behalf of defendants 7 to 11 without proper authorization. The defendants 7 to 11 are not denying the hereditary right of the plaintiff in the suit schedule properties as the daughter of Jeediginjala Manne Mallaiah and as sister of J.M.Srinivas, J.M.Krishna and late J.M.Shankar. As a daughter of the family and as a coparcener, the plaintiff succeeded to the estate of late Jeediginjala Manne Mallaiah. The suit schedule property was never partitioned amongst the coparceners by metes and bounds. As such the plaintiff has a legal right to sue

for partition and seek allotment of her share after converting joint possession into separate possession. The reasons that are mentioned in the affidavit filed in support of the petition to reject the plaint do not come under any of the clauses mentioned under Order VII Rule 11 of the Code. The defendants 7 to 11 while admitting the legal right of the plaintiff as a successor of her late father, J.M.Mallaiah, and as a coparcener, however, filed the above petition for rejection of plaint only on the ground that the suit for partition is not maintainable in view of the provision under Section 6 of the 1956 Act, as the property is alienated in the years 1997-1998, that is before 20th December 2004. It is to be established as to when the plaintiff came to know about the alleged registered sale documents. The issue of fraud is a pure question of fact. The period of limitation will not begin to run until the plaintiff has discovered the fraud. The plaintiff came to know about the illegal acts and the acts of fraud played by the defendants only after exchange of notices. The defendants conspired together with *mala fide* intention and did the wrongful and fraudulent acts. The plaintiff got issued registered legal notice on 29.8.2014 and received the reply legal notice dated 29.09.2014. Hence, the suit is maintainable under law. Under Mitakshara Law, so long as the property is not divided and the shares of the members of the family are unascertained, no member of a family can dispose of his/her share. A coparcener cannot alienate his/her share without the consent of the other coparceners. The father of the plaintiff died on 26.04.1982 and his wife, the mother of the plaintiff, J.M.Manemma, died on 24.04.2012. They left behind them, the plaintiff and the defendants 1 & 2 and late J.M.Shankar as their legal heirs. The said Shankar died on 14.06.2012 leaving behind his wife Padma and three children as his legal heirs. The Manager has no absolute power of disposal over joint Hindu family property and the Hindu law permits him to do so only subject to certain limitations and as such, the registered sale deeds allegedly executed in favour of the defendants 7 to 11 by the Manager of the family are

void. Possession of joint property by one co-owner is possession of all in the eye of law. Further passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment. The defendants 7 to 11 are trying to alienate the property in favour of third party purchasers by changing its nature; and a petition to restrain them from doing such illegal acts is pending adjudication. The defendants filed this vexatious petition with *mala fide* intentions in order to defeat the rights of the plaintiff and to gain wrongfully. The questions of law involved in the *lis* are mixed questions of fact and law and are to be decided after elaborate trial only. It is in the interests of justice, to dismiss the petition with exemplary costs.

6. The learned counsel for the defendants 7 to 11 made submissions in line with the pleaded case of the said defendants. In the grounds of revision, the pleaded case of the defendants was reiterated and it is *inter alia* contended that the order of the Court below is contrary to facts and provision of law and that the trial Court erred in dismissing the petition of the defendants on the ground that in view of Section 29-A of the Hindu Succession Act, a female coparcener can maintain the suit even though there is a bar under Section 6 of the Act and that the Court below ought to have seen that Section 6 proviso clearly bars the coparcener from claiming the relief of partition of property, when such property is already alienated or disposed of prior to 20th December 2004 and that the decisions relied upon by the Court below are not applicable to the facts of the case.

7. On the other hand, the learned counsel for the plaintiff while reiterating the pleaded case of the plaintiff had supported the orders of the Court below.

8. I have given earnest consideration to the facts and submissions. I have gone through the pleadings of the parties.

9. The plaintiff's contentions, which merit a mention and consideration, are as under: "The suit is brought for partition and declaration that certain documents are not binding on the plaintiff. Any document executed ignoring the right of a sharer does not bind such sharer, is not in dispute. The law is well settled that no one can convey a better title than what he has. Since the other sharers have no right to convey the share of the plaintiff, who is the daughter of the family, the sale deeds/ documents, if any, executed in respect of the entire property ignoring the share of the plaintiff are void to the extent of the share of the plaintiff and that the plaintiff can ignore such sale deeds. However, for abundant caution, a relief is also sought that the documents, which are executed ignoring the share of the plaintiff are not binding on her. The defendants 7 to 11 are proceeding on the assumptions and imaginary contentions that their defence is already established though trial has not yet commenced in the suit. The father of the plaintiff, Talari Mallaiah, died on 26.04.1982 and his wife died on 20.04.2012. In any view of the matter, on the death of the father, the plaintiff and her mother have become entitled to defined shares in the share of the late father of the plaintiff as per the law of succession. The defendants nowhere stated as to whether the subject property is the separate property of the father of the plaintiff or whether it is ancestral property of the two brothers. The defendants 7 to 11 are proceeding on the basis that it is the joint property of the two brothers, i.e., the father of the plaintiff, late Talari Mallaiah, and his brother Sathaiah. Unless the nature and character of the property is decided on facts, it is premature to contend that Section 6 of the Hindu Succession Act applies. After full-fledged trial, the Court has to decide as to whether either Section 6 or Section 8 of the Hindu Succession Act applies to the facts of the case. Even if Section 6 of the 1956 Act and other relevant provisions of law apply, still, the law is unsettled. It is also to be decided in the suit, after full fledged trial, as to whether or not the A.P. Amendment Act amending the Hindu Succession Act passed in the year

2005 applies to the facts of the case and whether or not the plaintiff can claim the benefit of the said provision of the said Amended Act where under rights were conferred on the daughter by placing her on par with a son. It is also to be examined as to whether such rights if any conferred and once vested by virtue of the A.P State Amendment to the Hindu Succession Act in the year 2005 cannot be divested as the law is well settled that a right, which has vested, cannot be divested by a subsequent Central amendment. The issues in regard to applicability of the provisions of law and the interpretation of the applicable provisions of law, on facts of the case, are mixed questions of fact and law and not pure questions of law and as such, the said questions cannot be prejudged. The issue of limitation and the issue based on plea of fraud are mixed questions of law and fact and cannot be prejudged without the parties entering trial. Hence, the petition is liable for dismissal.”

10. Before proceeding further, it is necessary to refer to the legal position.

The learned counsel for the parties cited the following decisions:-

- (1) P.V.Guru Raj Reddy v. P.Neeradha Reddy¹
- (2) Kamala v. K.T.Eshwara Sa and orders²
- (3) Damalanka Gangaraju v. Nandipati Vijaya Lakshmi³
- (4) M.Sujatha v. M.Surender Reddy⁴
- (5) Prakash v. Phulavati⁵
- (6) Burugupalli Seesharatnam v. Sirigina Ramalakshmi⁶
- (7) Ganduri Koteshwaramma v. Chakiri Yanadi⁷
- (8) Hardeh Ores (P) Ltd. v. Hede and company⁸
- (9) Santosh Popat Chavan v. Mrs. Sulochana Rajiv⁹
- (10) Sadhineni Rajani and another v. Sadhineni Hymavathi and others¹⁰

11. In the decision in P.V.Guru Raj Reddy (1 supra), it was held by the Supreme Court that it was only if averments in the plaint *ex facie* do not disclose the cause of action or on a reading of the plaint as a whole it appears

¹ 2015 (4) ALD 66

² AIR 2008 SC 3174

³ 2007 (4) ALD 694

⁴ 2016 (1) ALD 1

⁵ Civil Appeal no.7217 of 2013 & batch, dated 16.10.2015

⁶ Manu/AP/1247/2014

⁷ 2012 (2) ALD (SC) 50

⁸ (2007) 5 Supreme Court Cases 614

⁹ AIR 2016 BOMBAY 29

¹⁰ 2012 (2) ALD 777

that the suit is barred under any law, the plaint can be rejected and that in all other situations, the claims have to be adjudicated after regular trial. In the decision in Kamala (2nd supra), on facts, it was found that Order VII Rule 11(d) is not attracted as it did not appear from the statement in the plaint that the suit is barred by any law. It was further held by the Supreme Court that the plaint only has to be looked into and that the question whether the properties mentioned in the plaint are available for partition is essentially a question of fact. In the decision in Damalanka Gangaraju (3rd supra), this Court held that when there is a conflict between Union law and State law in respect of a concurrent subject, the State law shall be void to the extent that it is repugnant or it is inconsistent with the Central law. However, the contention of the plaintiff is that by virtue of Hindu Succession Act, 1956, Section 29A and Section 6, as amended by Act 13 of 1986 with effect from 05.09.1985, certain rights are vested in the plaintiff and that the said rights do not get divested on account of the subsequent central amendment by virtue of Act 39 of 2005, to the Hindu Succession Act, 1956, which came into force on 09.09.2005. Therefore, this legal question requires consideration after necessary evidence is adduced by both the sides and not while dealing with an application filed under Order VII Rule 11 of the Code. In the decision in M.Sujatha (4th supra) deals with the claim therein based on Section 6 of the Hindu Succession Act, 1956 as amended by the Parliament by Amendment Act 39 of 2005. The decision in Prakash (5th supra) also deals with the claim for a share in the properties which are subject matter of a suit for partition based on Amended Act 39 of 2005. In the decision in Burugupalli Seesharatnam (6 supra), the first appeal arising from a original suit filed for partition was decided on merits. In the decision in Ganduri Koteswaramma (7th supra), it was held that from on and from the commencement of the Hindu Succession (Amendment) Act, 2005, a daughter has all the rights and liabilities in respect of coparcenary property as that of a son. In the decision in Hardesh Ores (P)

Ltd. (8th supra), an injunction was sought for enforcement of negative covenants in an agreement (purportedly renewed) almost four years after the respondents therein had categorically denied the renewal. On facts, it was held by the Supreme Court that the language of Order VII Rule 11 is quite clear and unambiguous and that the plaint can be rejected on the ground of limitation only where the suit appears from the statement in the plaint to be barred by any law, including the law of Limitation. In the decision in Santosh Popat Chavan (9th supra), it was held by the High Court of Bombay that a widow has a right to institute a suit for partition in respect of the property of her husband and that such suit is maintainable as her right is not dependent upon the desire of the other coparceners. In the decision in Sadhineni Rajani and another (10th supra), it was held that the self acquired property in the hands of Hindu male dying intestate would be available for partition among all the Class I legal heirs and that the issue in such suit is covered by Section 8 and not Section 6 of the 1956 Act.

In United Insurance Co. v. C. R. Ramanatham,¹¹ in paragraph 10 it is observed as under:

Under Order VII Rule 11 (d) a plaint must be rejected only if the averments therein explicitly disclose that the suit was barred by the provisions of any law, but not otherwise. The Court had no power to throw out the suit by rejecting the plaint at the threshold stage by examining and interpreting the provisions of law on which the suit is found. Neither the express language of clause (d) of Rule 11 nor its intendment clothes the Court with such a power. The words “where the suit appears to be barred by any law” are qualified by “the statement in the plaint”. What is explicitly mentioned in the plaint, therefore, must alone be the basis for the exercise of power under Order VII Rule 11 (d), but not the conclusions that may be interpretatively drawn on an examination of the statutory provisions alluded to in the plaint. Where there was no such explicit statement in the plaint the question whether there was any legal barricade to the suit must be tried as an issue at the appropriate stage and that by this procedure alone the interests of both the parties to the suit could be safeguarded.”

¹¹ 1989 (1) ALT 190

In *Bhau Ram vs. Janak Singh and others*¹², it is held by the Supreme Court as under:

“The law has been settled by this Court in various decisions that while considering an application under Order VII Rule 11 Code of Civil Procedure, the Court has to examine the averments in the plaint and the pleas taken by the Defendants in its written statements would be irrelevant. [vide *C. Natrajan v. Ashim Bai and Anr.* (2007) 14 SCC 183, *Ram Prakash Gupta v. Rajiv Kumar Gupta and Ors.* (2007) 10 SCC 59, *Hardesh Ores (P) Ltd. v. Hede and Co.* (2007) 5 SCC 614, *Mayar (H.K.) Ltd. and Ors. v. Owners & Parties, Vessel M.V. Fortune Express and Ors.* (2006) 3 SCC 100, *Sopan Sukhdeo Sable and Ors. v. Assistant Charity Commissioner and Ors.* (2004) 3 SCC 137, *Saleem Bhai and Ors. v. State of Maharashtra and Ors.* (2003) 1 SCC 557]. The above view has been once again reiterated in the recent decision of this Court in *The Church of Christ Charitable Trust & Educational Charitable Society, represented by its Chairman v. M/s Ponniyamman Educational Trust represented by its Chairperson/Managing Trustee*, JT 2012 (6) SC 149.”

12. As per the provision of Order VII Rule 11 of the Code, the plaint shall be rejected where it does not disclose a cause of action or where the suit appears from the statement in the plaint to be barred by any law. I have carefully gone through the plaint to examine as to whether the plaint discloses a cause of action and to find out whether the suit appears from the statement in the plaint to be barred by any law. On a careful and meaningful reading of the plaint, it does not appear from the statement in the plaint that the suit is barred by any law. Be that as it may.

13. It is to be decided after full fledged trial as to whether the suit properties are separate properties of the father of the plaintiff or whether they are ancestral properties of the family. What would be the effect of the A.P. Amendment Act amending the Hindu Succession Act passed in the year 2005 and whether or not the plaintiff would be entitled to the benefits of the said law is to be examined, if eventually the property is found to be ancestral property. The case pleaded by the defendants 7 to 11 discloses that the property is that of the two brothers, viz., the plaintiff's father and his brother.

¹² AIR 2012 SC 3023

The plaintiff's father died in the year 1982 is not in dispute. His wife died thereafter in the year 2012. The claim that the plaintiff is a coparcener apart, in any view of the matter, on the death of the father, the plaintiff and her mother have become entitled to defined shares in the share of the father of the plaintiff as per the law of succession. On the death of the mother, the plaintiff has become entitled to a share in the share of her mother as well. The plaintiff did not join in the execution of the sale deeds. All the above said issues cannot be resolved without the parties entering trial. Keeping in view the precedential guidance in the decisions referred to supra, when the plaintiff's averments are harmoniously read, they disclose *prima facie* that there are sufficient averments to come to an *ex facie* conclusion that cause of action for prosecuting the suit against the defendants is sufficiently pleaded in the plaint. Further the question of limitation is a mixed question of fact and law and cannot be prejudged. In view of the peculiar facts and circumstances of the case and the precedential guidance, it must be held that the grounds urged by the defendants 7 to 11 in the petition filed seeking rejection of the plaint are devoid of merit and hence, the same cannot be countenanced at this pre-trial stage. In that view of the matter the contentions of the defendants 7 to 11 are liable to be rejected being devoid of merit. The said contentions of the defendants 7 to 11 are rejected accordingly. Viewed thus, this Court finds that the Court below is justified in dismissing the petition of the defendants 7 to 11 and that the order impugned does not call for any interference.

14. In the result, the Civil Revision Petition is dismissed.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand dismissed.

02nd September, 2016
RAR

M. SEETHARAMA MURTI, J

