

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.4558 of 2014

ORDER:

This civil revision petition under Article 227 of the Constitution of India is filed by the plaintiffs 1 & 3 assailing the orders dated 16.09.2014 of the learned I Additional Senior Civil Judge, Ranga Reddy District at L.B. Nagar passed in IA.no.768 of 2012 in OS.no.457 of 1997 filed under Section 151 of the Code of Civil Procedure, 1908 ('the Code', for brevity) requesting to delete the land admeasuring 2174 Square Meters equivalent to 2600 Square yards in Sy.no.312 situate at Gaddiannaram, Saidabad, Hyderabad, which is corresponding to town survey 13/1 Block H, Ward 170 of Gaddiannaram, from the 'B' schedule of the plaint schedule properties as the said property was purchased *bona fide* by the petitioners/defendants 18 to 21 under a registered sale deed bearing document no.2634 of 2004 dated 26.07.2004 and the rights in regard to the said property were already adjudicated in an earlier partition suit-OS.no.44 of 2006 on the file of the Court of the learned I Additional Judge, City Civil Court and that in view of the said finding the claim in this suit in respect of the said property is hit by the principles of *res judicata* and estoppel.

2. I have heard the submissions of the learned senior

counsel appearing for the revision petitioners/plaintiffs 1 and 3 ('the plaintiffs', for brevity) and the learned counsel appearing for the respondents to 1 to 4/defendants 18 to 21 ('the defendants 18 to 21', for brevity). The other respondents herein being co-plaintiffs and co-defendants are stated to be not necessary parties. I have perused the material record.

3. To begin with, it is to be noted is that in all six plaintiffs including the plaintiffs 1 and 3 brought the suit against several defendants for partition of plaint 'A' to 'E' schedule properties into six shares and for allotment of a $1/6^{\text{th}}$ share each to the plaintiffs 1 to 3; the plaintiffs 4 to 7; the defendants 1 and 2; the defendant no.6; the defendant no.5 and the defendants 6 to 16 and to pass a preliminary decree accordingly. The defendants 18 to 21 and some of the other defendants are contesting the suit. When the suit is at the stage of arguments, the defendants 18 to 21 filed the aforementioned application for deletion of the aforementioned property from the schedule of the suit for partition. That application was resisted by the plaintiffs. However, the trial Court had allowed the said petition and ordered for deletion of the property from the schedule of the plaint as sought for by the said defendants. Therefore, the plaintiffs 1 and 3 are before this Court.

4. Though the pleadings of the parties are voluminous, in the well considered view of this Court, it is not necessary to refer to the pleadings, in detail; and, a reference to the relevant pleadings only would suffice.

5. The case of the defendants 18 to 21 in support of their request is as follows:

The suit is filed for partition of the plaint schedule properties. The defendants 18 to 21 purchased, from the defendants 1, 3, 4 and the sons of the 1st defendant, the property which is stated in the petition i.e., plot bearing Sy.no.312 corresponding to town Survey no.13/1, Block H Ward 170 admeasuring 2600 Square Yards or 2174 Square Meters known as 'Kashikishan Chelka' situate at Gaddiannaram, Saidabad, Hyderabad by virtue of a registered sale deed dated 26.07.2004. The defendants 18 to 21 were and are in peaceful possession and enjoyment of the said property from the date of the said purchase. The former suit- OS.no.44 of 1964 on the file of the Court of the learned I Additional Judge, City Civil Court ended in a compromise and a compromise decree was passed in the said suit on 23.04.1975. In the said suit, the rights of the family members of the plaintiffs were decided. As per the compromise decree in the said suit, which is exhibited in the instant suit during the course of trial, the subject property covered by the above said sale deed was allotted to the vendors of the defendants 18 to 21 herein. The 1st plaintiff herein is a party defendant to the said former suit in which a compromise decree was passed. The compromise decree is valid and binding on the parties as the same was not cancelled even though it is being contended that it is a collusive decree and that the plaintiffs herein had not signed the compromise memo and had not given special

vakalat in the said suit to the 1st defendant and that the said compromise decree is not binding upon the plaintiffs herein. Further, the 1st defendant had filed a written statement categorically mentioning that he had sold 2600 Square yards to these defendants basing on the share allotted to Sathaiah, who is the father of the 1st defendant herein. In spite of such a defence that was taken, the plaintiffs did not take steps for cancellation of the compromise decree. As per the 'B' schedule of the plaint, the total extent covered by S.no.312 is Ac.10.37 guntas. Out of the said extent Ac.08.00 guntas was sold away to A.P. Agricultural University Co-operative Housing Society Ltd., after obtaining permission from the Government of A.P vide G.O.Ms.no.171 dated 21.01.1978. Out of the remaining extent of Ac.2.37 guntas, the owners were permitted to hold only a retainable area and were directed to surrender the excess area as per the orders passed by the Special officer and Competent Authority under the Urban Land Ceiling Law. The present suit is filed for partition of the properties, which are not in possession of the plaintiffs. Therefore, it amounts to playing fraud on the Court. The plaintiffs have got no right in and over the plaint 'B' schedule property. They ought to have filed a suit for recovery of possession and declaration, but without paying proper Court fee, the suit is filed for partition only to harass the innocent third party purchasers like these defendants. The 18th defendant had obtained 'No Objection Certificate' from the Revenue Department of Government of Andhra Pradesh *vide* orders dated 25.04.2009 in file

no.N1/19456/2008 for sanction of approval of the plan for construction over an extent of 2174 Square Meters in Sy.No.312 of Gaddiannaram, Saidabad, Hyderabad, which is corresponding to town survey 13/1 Block H Ward 170 of Gaddiannaram and the names of these defendants 18 to 21 are also shown in the town survey register. In the circumstances, the act of the plaintiffs in including the property of these defendants as the property of the plaintiffs in the partition suit is nothing but playing fraud on the Court and also on these defendants. Therefore, in respect of the said property the suit is liable to be dismissed. The Court is having ample power to delete the said land from the land in 'B' schedule property. In view of the compromise decree in OS.no.44 of 1964, the present claim for partition in respect of the subject property is hit by the principles of *res judicata* and estoppel as the issue in regard to the subject property was finally adjudicated in the former suit. Hence, the petition is filed for deleting the property of these defendants from the schedule of the plaint.

6. The plaintiffs in their counter while reiterating the pleaded case in the plaint and denying the contentions of the defendants 18 to 21 had *inter alia* contended as follows:

The 1st defendant being an advocate had colluded with the other defendants and had created the collusive decree in respect of the suit schedule properties by impersonating the 1st plaintiff herein before the Court of law. This 1st plaintiff had

never participated in the proceedings in OS.no.44 of 1964 or any other suit at any point of time and he had never appointed the 1st defendant as his counsel and he had also never permitted him to appear on his behalf by giving special vakalat and to enter into the compromise on his behalf in the above said former suit. The 1st defendant having suppressed the decree in OS.no.195 of 1958 against Lingala Sathaiah and the Government of Andhra Pradesh had created the collusive decree without the consent and knowledge of the 1st plaintiff. The suit schedule properties are ancestral properties and a finding to that effect was given in OS.no.195 of 1958 to which suit the defendants 1 to 4 and other coparceners are parties. That decree in that suit of the year 1958 has become final and entitles the plaintiffs to obtain a partition decree in the present suit. The said lands were never partitioned in between the plaintiffs and other coparceners at any point of time. The sale deed in favour of the defendants 18 to 21 was created in collusion to cause wrongful loss to the plaintiffs and to knock away their property and to defeat their rights in the property. Knowingly and intentionally, the defendants 18 to 21 had obtained the sale deed only to defeat the rights of the plaintiffs in the suit schedule properties. The sale deed obtained during the pendency of the suit and during the currency of the interim orders not to alienate the properties is hit by the principle enshrined in the doctrine of *lis pendens*. They cannot claim that they are *bona fide* purchasers on the basis of such a created sale deed.

7. The learned counsel for both the sides made submissions in line with the respective pleaded cases.

8. I have given thoughtful and detailed consideration to the facts and the submissions. I have perused the order impugned. The trial Court having regard to the contentions of the parties in the IA and having recorded a finding that the compromise decree in OS.no.44 of 1964 has become final and binding on the parties had then referred to the provision in Section 11 of the Code dealing with *res judicata* and had recorded the following finding in paragraph 13 of the order impugned: **'In the present suit also, the parties in OS.no.44 of 1964-the defendant no.7 therein is the plaintiff herein and the defendants 22 & 23 therein are the defendants 1 & 2 herein, the B schedule property in the present suit is also one of the schedule property in OS.no.44/64, so already the land in Sy.no.312 is decided in Os.no.44/64 and again claiming by the respondent/plaintiff in the present suit in respect of the land in Sy.no.312 is hit by Resjudicata.'** (Reproduced verbatim). Having recorded the above said finding the trial Court had allowed the petition of the defendants 18 to 21 and directed to delete the land admeasuring 2174 Square Meters equivalent to 2600 Square yards in Sy.No.312 situate at Gaddiannaram, Saidabad, Hyderabad, which is corresponding to town survey 13/1, Block H Ward 170 of Gaddannavaram Village from the schedule of the plaint. Therefore, the only ground on which the petition is allowed is that the claim for partition of the subject property

(aforementioned property) is barred by the principle enshrined in the doctrine of *res judicata* as the said issue has been finally decided in the former suit by way of a compromise decree dated 23.04.1975. It is pertinent to note that by the time the defendants 18 to 21 filed the present application before the Court below, the suit is at the stage of arguments. Their request for deletion of the subject property from the schedule of the plaint in the instant partition suit is based on the theory of *res judicata*. The defendants 18 to 21 *inter alia* contend that the plaintiffs are playing fraud in seeking partition of the property in regard to which the compromise decree was already passed in the former suit. On the other hand, the plaintiffs are contending that the compromise decree is a collusive and fraudulent decree and was obtained by impersonation of the 1st plaintiff and that the 1st plaintiff had never appointed the 1st defendant, who is an advocate, as an advocate to defend him and/or as his special vakalat holder for entering into the compromise and that he had never participated in the proceedings in the former suit OS.no.44 of 1964. From the pleadings of the parties it appears that the issue of *res judicata* raised by the defendants 18 to 21 in the subject interlocutory application is more a question of fact. The law is well settled that the issue of *res judicata* is a mixed question of fact and law. The compromise decree was passed on 23.04.1975. The present suit for partition is instituted in the year 1997, as is evident from the number of the suit. The claim of purchase by the present defendants 18 to 21 is under a sale deed dated 26.07.2004.

8.1 The plea of *res judicata* can be given effect if four conditions, which are required, are proved. They are - (i) litigating parties must be the same; (ii) the subject matter of the suit also must be identical; (iii) the matter must be finally decided between the parties; (iv) the suit must be decided by a court of competent jurisdiction. Further, the question – ‘whether the issue in the later suit was also in issue in the former suit’ depends on various factors and facts peculiar to the *lis*. Framing of an issue or for that matter not framing of a formal issue in the former suit in regard to the same subject matter is immaterial. But, the material test to be applied is whether the Court considered in the former suit the adjudication of the issue material and essential for its decision. Which of the matters are directly in issue and which are collaterally or incidentally in issue, must be determined on the facts of each case. Even though an issue is not formally framed, but, if it is material and essential in the earlier proceeding, a finding on that issue would operate as *res judicata* in the subsequent proceeding. In other words, to determine whether an issue was directly and substantially in issue, normally one has to examine the plaint, the written statement, the issues and the judgment and then find out if the matter was directly and substantially in issue and it is not to be assumed that matters in respect of which issues have been framed are directly and substantially in issue nor is there any special significance to be attached to the fact that a particular issue is the first in the list of issues. One of the tests is if the issue is necessary to be decided for adjudicating the

principal issue and was decided, it would have to be treated as directly and substantially in issue; and, if it is clear that the judgment was in fact based upon the decision on such issue, then it would operate as *res judicata* in a later case.

8.2 Therefore, to succeed on the plea of *res judicata*, the defendants 18 to 21 have to plead and prove the essential factual and legal requirements. It is brought to the notice of the Court at the hearing that no issue in regard to *res judicata* was framed by the Court below in the instant suit, which is at the stage of arguments. Therefore, *res judicata* being a mixed question of fact and law and not a pure question of law, the issue of *res judicata* should not have been permitted to be raised by the defendants 18 to 21 that too in an interlocutory application, more particularly, when the suit is at the stage of arguments and when no issue of *res judicata* was framed for determination in the later suit i.e., the instant suit. When no issue was framed in the suit based on the plea of *res judicata*, going by the normal rule of law, the defendants cannot be allowed to raise the said defence even at the time of final adjudication of the suit, as allowing the defendants to raise such a defence without an issue would amount to taking the plaintiffs by surprise. Therefore, it is highly doubtful as to whether the defendants 18 to 21 could be permitted to raise such an issue for determination in the suit.

9. Viewed thus, this Court finds that the trial Court has committed a grave and fundamental error in allowing the defendants 18 to 21 to raise the issue of *res judicata* in an

interlocutory application and in answering the said issue that too without adverting to the factual and legal requirements and the evidence brought on record, which is relevant to the said issue. Therefore, the order impugned, which is erroneous and unsustainable brooks interference.

10. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.768 of 2012 in OS.no.457 of 1997 stands dismissed. It is needless to state that the trial Court shall dispose of the suit in strict accord with the due procedure and the Law.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this CRP shall stand closed.

M. SEETHARAMA MURTI, J

18.04.2016

Vjl