

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition no.684 of 2014

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ORDER:

This Civil Revision Petition under Article 226 of the Constitution of India by the unsuccessful petitioner/defendant no.1 is directed against the orders dated 20.01.2014 of the learned I Additional District Judge, Anantapur in I.A.no.956 of 2013 in O.S.no.110 of 2013 filed under Order VII Rule 11 and Order 14 Rule 2 read with Section 151 of the Code of Civil Procedure, 1908 requesting to dismiss the suit with exemplary costs as not maintainable by framing a preliminary issue.

2. I have heard the submissions of the learned counsel for the petitioner/defendant and the learned counsel for the respondent/plaintiff. I have perused the material record.

3. The case of the 1st defendant in support of the aforesaid request, in brief, is this:

The plaintiff and the defendants 2 to 6 in the suit are not the owners of the plaint schedule property; and, they have nothing to do with the same. The plaintiff is claiming title over the plaint schedule property on the basis of a registered Will dated 15.06.1944 said to have been executed by one Challa Rangappa S/o Ramaiah. The testator has bequeathed some amount under the said Will to all his daughters including the plaintiff. The plaintiff alleged in the plaint that the property under the Will is the self-acquired property of her father. Under the Will, the testator having bequeathed some other properties to the plaintiff and her sisters had appointed his brother Challa Aswarthappa as executor to deal with the suit schedule property. Thereafter, his brother Aswarthappa as executor and Obulamma, the wife of the testator, together had executed a registered document bearing no.548/1946 dated 16.03.1946 and sold the property of an extent of Ac.0.04 cents to Dadditota Venkataramanappa and Adinarayana who are the sons of Dadditota Venkataramanappa. The description of the property discloses that the said

property is situated to the West of the Sessions Court road. Since the date of the sale, the said purchasers are enjoying the property with absolute rights. On the same day, i.e., 16.03.1946, an extent of Ac.0.07 ½ cents was sold in favour of Y.Hanumakka of Tadipatri by the said executor Challa Aswarthappa and the wife of the testator-Obulamma. The possession of the said property was delivered to the purchaser. The certified copies of the said sale deeds are filed into Court. Further, out of Ac.0.22 cents in Sy.no.2027 of Anantapur Municipal limits, an extent of Ac.0.11.5 cents was sold out to the above-referred persons in the year 1946 itself. The remaining Ac.0.11 cents was also sold out. The 1st defendant is making efforts to secure the relevant sale deeds. Even as per the contents of the Will, though not admitted by the 1st defendant, the plaintiff and other defendants 2 to 6 being the legal heirs cannot claim any rights under the Will as the entire rights over the plaint schedule property vested with Challa Aswarthappa, i.e., the brother of the testator, who had sold out the properties. Therefore, the suit is not maintainable. The recitals in the Will clearly show that Challa Aswarthappa was the executor. The 1st defendant has filed the copy of sale deed bearing registration no.11546 of 2011, which is a sale deed in favour of the 1st defendant. The 1st defendant had also filed registration extract of sale deed dated 15.06.1944. The plaint schedule and the schedules of the properties in the two documents are shown in a tabular statement in support of the case of the 1st defendant. The tabular statement furnished by this defendant would reveal that the property alleged to be covered under the Will and the property mentioned in the schedule of the suit and the property of the 1st defendant shown in the sale deed bearing no.11546 of 2011, which is filed as document no.4 with the plaint and the property owned by this defendant are different and distinct and not at all identical to the so called suit schedule property. To the knowledge of the defendant, no such property like the suit schedule property exists on ground. The so called boundaries of the plot numbers mentioned in the plaint schedule are created and not supported by any documents. A comparative analysis of the schedules of properties in the Will

and the sale deed dated 15.12.2011 as well as the schedule of the plaint makes it crystal clear that the property being claimed by the 1st defendant is neither identical nor similar to that of the plaint schedule property and that the two properties are not the same but are different. The 1st defendant is the absolute owner of the property mentioned in the sale deed bearing no.11546 of 2011 and he had purchased the same by paying a sale consideration of Rs.1,05,00,000/- and he was put in possession and enjoyment of the property as on the date of the sale itself. The vendors 3 and 4, i.e., Gouri Manogna and Uma Maheswari were minors as on the date of the said sale deed. Therefore, they had obtained permission in O.P.no.141 of 2011 dated 14.06.2011 from the District Judge, Anantapur, and accordingly, their share of sale consideration in a sum of Rs.10,67,000/- was kept in fixed deposit as ordered by the District Court. The vendors of the 1st defendant had purchased the property from their vendors. The 1st defendant had obtained permission from the Municipal Corporation, Anantapur to construct multi-storied building and accordingly, completed stilt portion by investing nearly 1.5 crores and the cost of the project is estimated at about Rs.10,00,00,000/-. The approval for construction of the building issued by the Corporation along with the sketch, plans and construction designs is filed into Court. The plaintiff has not stated in the plaint as to on what date, she was ousted from possession and on what date the 1st defendant had trespassed into the plaintiff's property. The said details are not mentioned as no such trespass had ever taken place. The plaint averments are invented. The possession of the 1st defendant over the property that is being claimed by it is legal as the title devolved upon the 1st defendant from the original owners. In the suit, the defendants 2 to 6 are proforma parties and no relief is claimed against them. The alleged cause of action does not exist. The plaint schedule property does not exist on ground. Such property never existed on ground at any point of time since 1946. The property of the 1st defendant is different and distinct as per the sale deed. The suit is liable to be dismissed.

4. The case of the plaintiff in her counter, in brief, is this:

The petition is filed to drag on the matter and make a wrongful gain. The intention of the 1st defendant is to create multiple litigations. The petition is not maintainable under Order VII Rule 11 and Order XIV Rule 2 of the Code. The petitioner/1st defendant admitted some facts, but had denied the other facts. The 1st defendant who relies upon the document bearing no.11546 of 2011 had admitted that the 1st defendant is constructing a multi-storied building. The said fact itself reveals that the 1st defendant is in possession of the plaint schedule property and that he had ousted the plaintiff from the possession of the plaint schedule property. The plaint averments will have to be proved at the time of trial. The provisions of law, which are stated by the 1st defendant, are not applicable to facts of the case. If the property of the 1st defendant is different and distinct from the plaint schedule property, there is no need for the 1st defendant to object for the prosecution of the suit by the plaintiff and appointment of an Advocate Commissioner to measure the property with the assistance of a Mandal Surveyor, which course would bring the real facts to light. The petition may be dismissed.

5. At the time of hearing before the trial Court, no oral and documentary evidence was adduced on either side. On merits and by the order impugned, the trial Court had dismissed the petition *inter alia* holding that the question of framing a preliminary issue and dismissing the suit does not arise at the threshold, as some of the defendants are not yet served with suit summonses; and, that merely basing on the contentions of the 1st defendant that the 1st defendant purchased the property covered by the schedule of the document dated 15.12.2011 from the original owner-K.Venkata Krishna and three others, it is not possible to dismiss the suit.

6. The learned counsel for the petitioner/1st defendant while reiterating the case pleaded, which is extracted supra, would contend as follows:

The pleadings in the plaint do not disclose the cause of action for the suit. By filing a copy of his document, the 1st defendant had established that he had purchased the property covered by the sale deed dated 15.12.2011

bearing document no.11546 of 2011. The plaint schedule and the property of the 1st defendant are different and distinct. The trial Court ought to have dismissed the suit by virtue of the mandate under Section 3 of the Limitation Act, 1963, which lays down that the Court has to dismiss a suit when it is barred by law of limitation. The trial Court had erroneously dismissed the petition of the 1st defendant holding that the suit summonses are not yet served upon some of the defendants, who are proforma parties. Under the suit document, no title has flown to the plaintiff. The entire property bequeathed under the alleged Will of Challa Rangappa was sold away by the executor, Challa Aswarthappa, who is no other than the brother of the testator and also by Obulamma, the wife of the testator. The absence of pleadings in regard to possession of the plaintiff and any document supporting the claim of the plaintiff would clearly show that the suit is not maintainable.

7. On the other hand, the learned counsel for the respondent/plaintiff supported the orders of the Court below.

8. Before proceeding further, it is apt to note that the learned counsel for the petitioner/defendant placed reliance on the following ratio in **Saleem**

Bhai and Ors v. State of Maharashtra and Ors. [\[1\]](#)

“A perusal of Order VII Rule 11 C.P.C makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can exercise the power under Order VII rule 11 CPC at any stage of the suit before registering the plaint or after issuing summons to the defendant and at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order VII C.P.C., the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage, therefore, a direction to file the written statement without deciding the application under Order VII Rule 11 C.P.C cannot but be procedural irregularity touching the exercise of jurisdiction by the trial Court. ”

There is no dispute with the above settled legal proposition.

Placing reliance on this decision it is contended that the order of the Court below suffers from non-exercising of the jurisdiction vested in the court as well as procedural irregularity.

9. A plain reading of the pleadings of the 1st defendant is by itself sufficient to hold that the petition of the 1st defendant requesting the trial Court to dismiss the suit of the plaintiff as not maintainable after framing a preliminary issue is liable for dismissal. The 1st defendant is not able to say as to what issue is to be framed as a preliminary issue. Nowhere in the affidavit filed in support of the petition, is it stated as to what is the specific issue that is to be framed to be tried as a preliminary issue. At one breath, it is stated that on a preliminary issue, the suit is to be disposed of. At another breath, it is being contended that the plaint is to be returned for want of cause of action. In the grounds it is also urged that the suit is liable to be rejected since barred by law of limitation, without substantiating the said contention by any means known to law. It is also *inter alia* stated that the plaint schedule property does not exist at all on ground. A plain and meaningful reading of the plaint discloses that cause of action is specifically pleaded in the plaint and that from the statements in the plaint it is not possible to hold that the suit is barred by any law for the time being in force. The petitioner/1st defendant further claims that the brother of the testator and the wife of the testator had executed sale deeds. Further, while contending that the 1st defendant's property is totally different and distinct from the plaint schedule property, the 1st defendant complains that he is aggrieved of the suit and that the plaintiff cannot prosecute the suit. It is pertinent to note that the suit is filed for declaration of title and recovery of possession of the plaint schedule property in two items. The plaintiff is the daughter of Challa Rangappa, the original owner of the property is not in dispute. His brother Challa Aswarthappa is said to be the executor under the said Will. In the prayer mentioned in the subject petition of the petitioner/1st defendant, it is prayed that the suit may be dismissed with exemplary costs as not maintainable by framing the preliminary issue. The law is well settled that the identity of the suit property

is outside the scope of Rule 11 of Order VII of the Code. [Vide **Kamala v. K.T.Eshwara Rao** [AIR 2008 SC 3178]. All the inconsistent and made up contentions in the affidavit of the petitioner/1st defendant lay bare that the petition is misconceived and frivolous and that the person representing the petitioner/1st defendant-M/s. B.N.R Constructions is himself not sure as to what he intended to say in his affidavit filed in support of the petition and that he is also not sure of the relief that is to be sought for and the contentions intended to be urged in the subject interlocutory application filed before the trial Court. Be that as it may, on the basis of the various contentions raised in the affidavit filed in support of the petition of the petitioner/1st defendant and keeping in view the plaint averments, this Court is of the well-considered view that no case is made out for either dismissing the suit as not maintainable even without the parties entering trial or for returning or rejecting the plaint on any grounds. For the reasons aforesaid, this Court finds that the Court below is justified in dismissing the petition of the 1st defendant and that therefore, the revision is devoid of merit and is liable to be dismissed.

10. Accordingly, the Civil Revision Petition is dismissed with costs.

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

M.SEETHARAMA MURTI, J

04th July, 2016
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^[1] AIR 2003 SC 759