

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.4717 of 2016

ORDER:

This Civil Revision Petition by the unsuccessful plaintiffs is directed against the order, dated 03.09.2016, of the learned Principal Senior Civil Judge, Mahabubnagar, passed in I.A.No.40 of 2016 in O.S.No.159 of 2007 filed under Order XXIII Rule 1 of the Code of Civil Procedure, 1908, requesting to grant leave, in the interests of justice, to withdraw the suit and file a fresh suit in respect of the subject matter on the same cause of action.

2. I have heard the submissions of *Sri M.Damodar Reddy*, learned counsel appearing for the revision petitioners/ plaintiffs ('plaintiffs', for brevity) and *Sri B.Mohan*, learned counsel appearing for respondents 4, 6 and 8. The 1st respondent is stated to have died. The respondents 2, 3, 9 and 10 are stated to have remained *ex parte* in the proceedings before the Court below and hence, not necessary parties. Though respondents 5, 7 and 11 are served, they did not enter appearance. I have perused the material record.

3. The facts, which are required to be stated as a preface to this order, in brief, are as follows:

The plaintiffs brought the suit against the defendants for partition of the plaint schedule properties into (384) shares according to good and bad qualities and for allotment of 9/ 384th share each to the plaintiffs 1 and 2 and put them in possession of the shares separated by metes and bounds and for costs. During the pendency of the suit, the plaintiffs filed the aforesaid interlocutory application seeking leave to withdraw the suit and institute a fresh suit in respect of the subject matter on the same cause of action. The said application was resisted by some of the contesting defendants. On merits, and by the order impugned in this revision, the trial Court dismissed the petition of

the plaintiffs having observed that the plaintiffs can withdraw the suit if they intend to do so, but no liberty can be given to them to institute a fresh suit in the facts and circumstances of the case. Therefore, the aggrieved plaintiffs are before this Court.

4. Before proceeding further, it is necessary to refer to the pleadings of the parties.

4.1 The case of the plaintiffs and the submissions made on their behalf in support of the aforesaid request, in brief, are as follows:

During the pendency of the suit, the 1st defendant, who was having a half share in the properties, died, on 29.12.2012. She bequeathed her entire share in favour of the plaintiffs by executing a registered Will, dated 30.06.2010. Accordingly, the share of the plaintiffs increased from 18/384th to 210/384th share in the suit schedule properties. Further, the plaintiffs could not collect the total history of the family and the details of ancestral properties and, therefore, failed to add in 'C' schedule of the plaint some of the lands, i.e., Ac.30.04 guntas and Ac.5.26 guntas in Sy.Nos.182 and 183 of Inole village, Achampet Mandal, Mahabubnagar District, which belong to the family. The said failure to include all the properties is neither intentional nor deliberate but due to non-cooperation of the relatives who are under the influence of the defendants. If the suit is to be proceeded with, without getting the said defects rectified, the plaintiffs would be put to irreparable loss and would be deprived of their rights over the properties. Hence, leave may be granted for withdrawing the suit and instituting a fresh suit.

4.2 The 4th defendant filed a detailed counter; so also the 8th defendant. The defendants 6 and 7 by a memo filed before the trial Court stated that they adopt the counter affidavit of the 8th defendant.

4.3 The defence of the contesting defendants and the submissions made on their behalf, in brief, are as follows:

The suit itself is not maintainable under facts and in law. The plaintiffs misrepresented and suppressed material facts. The suit is liable for dismissal in limine. The suit is bad for non-joinder of proper parties and non-disclosure of the properties of the father of the plaintiffs and for including *mala fide* the other exclusive properties of the defendants. The plaintiffs are not entitled to claim a share in 'A', 'B' and 'C' schedule properties. There is no ancestral property at Inole village of Achampet Mandal, which is liable for partition along with other properties in 'C' schedule. The properties are individual properties of the defendants. Agricultural lands in Sy.Nos.182 and 183 are not joint family properties; and, they are the personal properties of the 4th defendant. The plaintiffs earlier filed petitions in I.A.Nos.47 of 2015, 49 of 2015 and 50 of 2015 and 7 of 2016 for inclusion of the agricultural lands in Sy.Nos.182 and 183 in plaint 'C' schedule property and to receive the Will deed and for other reliefs. All the said four petitions were dismissed by the Court below. The revisions against the said orders in C.R.P.Nos.1917 of 2016, 2006 of 2016 and 1722 of 2016 and appeal in C.M.A.No.342 of 2016 are pending on the file of this Court. The petitioners lost their right to claim partition of the said properties. They cannot re-agitate the same issue by filing another suit. PW1 in her cross-examination made certain admissions. In view of the admissions of PW1, the petition is filed, by suppressing the facts, to mislead the Court. The petition is filed by the plaintiffs to avoid partition of the land in Sy.Nos.22, 23 and 49 admeasuring Ac.21.11 guntas shown in 'C' schedule, item nos.1, 2 and 7, which stand in the name of late R.Padma Reddy amongst his legal heirs. The plaintiffs remained silent till certain admissions are elicited in the cross-examination of PW1. The plaintiffs failed to establish a *prima facie* case that they are entitled to a share in the plaint schedule property and to seek leave for filing a fresh suit. Since the trial Court passed sustainable orders in the

earlier I.A.Nos.47, 49 and 50 of 2015, and 7 of 2016 in the above suit, the plaintiffs have no cause of action to seek leave to withdraw the present suit and institute a fresh suit.

5. Learned counsel for the parties advanced arguments in line with the pleadings of the respective parties. Be it noted that though certain submissions made in the counter affidavits of the contesting defendants in regard to the merits of the issues involved in the main suit, there is no need to advert to such contentions, which require detailed consideration and examination, if necessary, at the time of final adjudication of the issues settled for determination in the suit. Be that as it may.

6. Learned counsel for the plaintiffs would submit as follows: 'Certain properties are not included in the schedule of the suit for partition and the defendants are contending that some necessary and proper parties are not impleaded. To avoid dismissal of the suit on technical grounds certain properties and some other parties may have to be joined in the suit before the suit is further prosecuted. A suit for partial partition without impleading the proper and necessary parties is not maintainable. The trial Court earlier dismissed the application filed for adding properties to the schedule of the plaint. Though the 1st defendant died during the pendency of the suit after executing a registered Will bequeathing her half share in the plaint schedule to the plaintiffs and the plaintiffs share increased, the trial Court refused to grant leave to file the said Will, which is a registered Will. Therefore, the plaintiffs must be given an opportunity either to proceed with the suit after rectifying the defects or in the alternative leave must be granted to withdraw the present suit and file a fresh suit after meeting all the requirements of facts and law. There is no limitation for a suit for partition. Therefore, the trial Court was in error in dismissing the petition of the plaintiffs.

7. Learned counsel for the contesting defendants while supporting the orders of the Court below, which are impugned in this revision, would submit that nearly one decade had elapsed since the date of filing of the suit and that the plaintiffs had already filed interlocutory applications for - inclusion of agricultural lands in 'C' schedule; to receive a Will; and, for other reliefs. The said petitions were dismissed by the trial Court and revisions and a CMA filed by the plaintiffs against the said orders are pending before this Court. Several witnesses were examined; and' the trial had made considerable progress; and, when the suit is coming for adducing evidence of the 5th defendant, the present petition is filed. Therefore, the trial Court rightly dismissed the petition considering the fact that the plaintiffs are indolent and that there are laches on their part and that to cover up the laches and mistakes they cannot be allowed to put the clock back. There is no merit in the revision.

8. I have bestowed my attention to the facts and submissions.

9. The plaintiffs are seeking leave for withdrawal of the suit with liberty to institute a fresh suit on the same cause of action mainly on three grounds: *Firstly*: During the pendency of the suit, the 1st defendant died, on 29.12.2012, by executing a registered Will, dated 30.06.2010, bequeathing her half share in the plaint schedule property to the plaintiffs; and, therefore, the share of the plaintiffs increased from 18/384th to 210/384th in the suit schedule property. Their request to receive the Will on file was negatived by the trial Court. *Secondly*: The plaintiffs could not collect the total history of the family and the details of ancestral properties and, therefore, failed to add in 'C' schedule of the plaint some of the lands, i.e., Ac.30.04 guntas and Ac.5.26 guntas in Sy.Nos.182 and 183 of Inole village, Achampet Mandal, Mahabubnagar District, which belong to the family; Therefore, they filed an application for including the other properties in the plaint 'C' schedule, but that application was dismissed by the trial Court. *Thirdly*; the defendants are contending that the

suit is bad for non-joinder of necessary parties. As rightly contended by the learned counsel for the plaintiffs, the trial Court dismissed the petition filed by the plaintiffs for permission to amend the schedule to include the aforesaid properties for seeking partition of the said properties also. The trial Court also dismissed the petition filed by the plaintiffs for receiving on file the registered Will executed by the deceased 1st defendant, who died during the pendency of the suit, despite the fact that the plaintiffs are contending that their share increased by virtue of the bequest in their favour under the said Will. The defendants at one breath are contending that the suit schedule properties are not liable for partition and that the suit is liable for dismissal in limine; at another they are contending that the plaintiffs failed to add necessary parties and that the suit is bad for non-joinder of necessary parties. In the written statement of the 4th defendant, while requesting to dismiss the suit of the plaintiffs with heavy costs, a prayer was made to pass a preliminary decree for partition of the agricultural lands in Sy.No.s22, 23 and 49 admeasuring Ac.7.20 guntas, Ac.1.26 guntas and Ac.12.00 guntas respectively into seven equal shares and allot one such separated share to the legal heirs of late A. Padma Reddy, that is, defendants 2 to 5, M. Yasoda, legal heirs of late K. Ahalya Devi and legal heirs of late R. Jayapal Reddy. Thus, in the written statement, shares are being sought to be allotted to certain third parties, who are not admittedly parties to the suit. In the written statement, it is also pleaded that Yasoda Devi and legal heirs of deceased K. Ahalya Devi namely M. Vinutha, R. Vijitha Reddy, J. Rajitha, K. Pradeep Reddy and K. Praveen Reddy; and legal heirs of late R. Jaipal Reddy are entitled to a 1/7th share each in the agricultural lands left behind by late R. Padma Reddy. During the course of hearing, it is also contended that the mother of the revision petitioners, Jayamma, and sisters of the revision petitioners, Rama and Radhika and another daughter of Ranga Reddy are also not impleaded as parties to the suit though they are necessary and proper parties. Be that as it may, the

contesting defendants are also opposing for institution of a fresh suit by the plaintiff after withdrawal of the instant suit. In the light of the fact that the interlocutory applications filed by the plaintiffs were dismissed by the trial Court, the plaintiffs are precluded from amending the schedule of the plaint and including the properties, which according to them are also liable for partition. The question whether the properties, which the plaintiffs now intend to include in the schedule of the suit, are liable for partition or not cannot be prejudged. Additionally, by dismissing their application to grant leave to file the registered Will executed by the deceased 1st defendant, the trial Court precluded them from advancing their additional pleas that on the death of the 1st defendant and by virtue of the registered Will said to have been executed by her, her half share devolved upon them and that their share in the suit properties enlarged into a large share.

10. The law is well settled that if there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the Court and such legal representative, if not already on record, is brought on record, it can be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order XXII Rule 5 will of course be for the limited purpose of representation of the estate of the deceased, for adjudication of that case. Unless the issue as to who amongst the parties are entitled to represent the estate of the deceased 1st defendant is first decided the trial Court cannot further proceed with the trial of the suit. [See: *Jaladi Suguna (Dead through L.Rs) v. Satya Sai Central Trust*¹]. However, the said course was not followed in this case and the plaintiffs attempt to bring on record the Registered Will said to have been executed by the deceased 1st defendant was negated by the trial Court. It is also well settled that whenever there is devolution of interest in the property involved in the *lis*

¹ AIR 2008 SUPREME COURT 2866

either by death of a party to the *lis* or a document *inter vivos* or a Will or a deed of Gift executed by the deceased party in favour of another party, the said aspects shall be brought to the notice of the Court and necessary application/s either for bringing on record the legal representatives of the deceased party or for leave to continue the suit in view of the devolution of interest, as the case may be, shall be filed by the parties and the said applications shall be decided at the appropriate earliest stage and the decisions on the said aspects cannot be allowed to be postponed and shall not be allowed to be brought to the notice of the Court at the final stage of adjudication. [See: Kirpal Kaur v. Jitender Pal Singh²]. In the said circumstances, if the plaintiffs are compelled to continue to prosecute their suit after denying them the said opportunities, the plaintiffs would be put to irreparable loss. Be that as it may.

11. Even according to the case of the contesting defendants, a number of parties/ sharers, though necessary and proper parties, are not impleaded as party defendants to the suit and that on the ground of non joinder of necessary parties, the suit is liable for dismissal. Therefore, the plaintiffs are required to cure the said defect by now bringing on record all the necessary parties as otherwise for non impleadment of necessary and proper parties, there is likelihood of the suit being dismissed. Thus, for non impleadment of the necessary parties and non inclusion of all the properties which are liable for partition, according to the plaintiffs, the suit suffers from formal defect or defects analogous to the formal defects and that, therefore, there are sufficient grounds to permit them to withdraw the suit and institute a fresh suit. It is also their submission that their application to include omitted properties was already dismissed by the trial Court and that a CMA is already pending in that regard and that if the suit has to be proceeded without including all the properties in the suit schedule and impleading all the

² (2015) 9 Supreme Court Cases 356

necessary and proper parties, the entire proceedings would be fruitless, in view of the facts and circumstances of the case. Further, as rightly urged by the learned counsel for the plaintiffs, on the death of the 1st defendant, no steps are taken by either of the parties in the suit for partition for recognition of the 1st defendant's legal representatives/legal heirs. When the 1st defendant died and her estate devolved upon some of the parties/sharers and when there is a claim by the plaintiffs that she executed a Will in their favour and that by virtue of the said Will the plaintiffs have become entitled to claim the share of the deceased 1st defendant, the plaintiffs ought to be given an opportunity to plead the said aspects by either amendment of the plaint or by way of filing necessary applications, as the trial Court, before adjudicating the issues involved and giving a quietus to the lis, is required to take note of the fact of the death of the 1st defendant and decide who amongst the parties are entitled to represent the estate of the deceased 1st defendant. As already noted, the request of the plaintiffs to permit them to file the registered Will said to have been executed by the 1st defendant was negated by the trial Court and revisions are stated to be pending before this Court. When the plaintiffs claimed that the estate of late 1st defendant devolved upon them, in the absence of adjudication on the said aspect, the observation of the Trial Court that the suit abated on the death of the 1st defendant is incorrect. As already noted, the plaintiffs are being compelled to prosecute their suit after denying them all the opportunities.

11.1 Before proceeding further, it is to be noted that learned counsel for the plaintiffs relied upon a decision of this Court in Pillakathuku Subbarathnam v. Executive officer, Polathala Malleswaraswamy Temple, Kadapa District³ in support of the proposition that the expression 'sufficient grounds' employed in Order XXIII Rule 1 of the Code must be considered liberally depending upon the facts and circumstances of a given case and that

³ 2005 (5) ALD 75

in the case on hand, the plaintiffs made out sufficient grounds for consideration of their request for withdrawal of the suit and granting liberty to institute a fresh suit at a later point of time. He also placed reliance on the decision in *V. Rajendran v. Annasamy Pandian*⁴ in support of the contention that mis joinder of parties, non joinder of parties, failure to disclose cause of action etcetera come within the scope of formal defect and that the expression 'formal defect' must be given liberal meaning. He placed reliance on paragraph 11 of the cited case, which reads as under: 'In terms of Order XXIII Rule 1(3)(b) where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit, the Court may permit the plaintiff to withdraw the suit. In interpretation of the word "sufficient grounds", there are two views: One view is that these grounds in clause (b) must be "ejusdem generic" with those in clause (a), that is, it must be of the same nature as the ground in clause (a) that is formal defect or at least analogous to them; and the other view was that the words "other sufficient grounds" in clause (b) should be read independent of the words a 'formal defect' and clause (a). Court has been given a wider discretion to allow withdrawal from suit in the interest of justice in cases where such a prayer is not covered by clause (a). Since in present case, we are only concerned with "formal defect" envisages under clause (a) of Rule (1) sub-rule (3), we choose not to elaborate any further on the ground contemplated under clause (b) that is "sufficient grounds". The legal position in the decisions squarely applies to the facts of the present case, in the considered view of this Court.

11.2 Per contra, learned counsel for contesting defendants-respondents herein placed reliance upon the decisions in *G. Achanna v. P. Pratap Reddy*⁵

⁴ AIR 2017 SC 685

⁵ 2007 (6) ALT 635

and Somaraju Chinnammi v. Samanthu Sivaji Ganesh⁶ and advanced the following propositions: 'The suit is of the year 2007; the present application for withdrawal is filed after the evidence has concluded and as admissions favourable to the contesting defendants are made in the evidence on the side of the plaintiffs; admittedly the application for amendment of the plaint was dismissed and a CMA is pending; during pendency of the CMA, this application for withdrawal of the suit with liberty to institute a fresh suit is filed without prosecuting the CMA; the instant petition for withdrawal of the suit with liberty to file a fresh suit is, therefore, an abuse of process of Court. In the decision in G. Achanna, (5th supra) the facts show that the applicant who filed the application for withdrawal of the suit with liberty to file a fresh suit merely alleged that there are chances of losing the present suit by him and that therefore he wants to file a fresh suit; he contested over a period of ten years on the admissibility of a document; and, after ten years he claimed that he does not want to rely upon that document and wants to file a fresh suit. Therefore, this Court held that the case of the plaintiff therein is a classical case of abuse of process of law. In Somaraju Chinnammi's (6th supra), the petitioner only repeated the expression 'formal defect' but failed to specifically plead the so called formal defect and, therefore, the trial Court was unable to record its satisfaction that the suit would fail by reason of formal defect. In that view of the matter, this Court held that the trial Court was justified in dismissing the application of the plaintiff therein. The decisions relied upon by the learned counsel for the contesting defendants, obviously, turned on facts of the said cases. No-doubt, on the dismissal of the interlocutory applications of the plaintiffs, certain proceedings are pending before higher fora. In the considered view of this Court, pendency of those proceedings before the higher fora does not preclude the plaintiffs from seeking the present relief as the pending proceedings filed against the the

⁶ 2008(6) ALT 215

adverse orders in the interlocutory applications would become infructuous in case the plaintiffs are granted a relief in the instant interlocutory application.

12. Be it noted that at the conclusion of the arguments, learned counsel for the contesting defendants would submit that some of the contesting defendants are willing to transpose themselves as plaintiffs and prosecute the suit. However, the said defendants, who claim for an opportunity to be transposed as plaintiffs, are not interested in prosecuting the whole suit for partition as brought by the plaintiffs. And, as already noted they want to prosecute the suit in part for partition in respect of agricultural lands in three items in Sy.No.s22, 23 and 49 admeasuring Ac.7.20 guntas, Ac.1.26 guntas and Ac.12.00 guntas. And, their case is that the said lands are to be partitioned into seven equal shares and that one such separated share is to be allotted to the legal heirs of late A. Padma Reddy, that is, defendants 2 to 5, M. Yasoda, legal heirs of late K. Ahalya Devi and legal heirs of late R. Jayapal Reddy. Some of such alleged sharers are not parties to the suit is undisputed. Therefore, even if transposition of the interested defendants as plaintiffs is to be permitted, yet the controversy cannot be resolved and the issues involved in the *lis* cannot be given a quietus once and for all without amendment of plaint, addition of parties, filing of pleading & additional pleadings and further trial.

13. On the above analysis, this Court is of the well considered view, that the plaintiffs cannot be denied an opportunity to amend the plaint and to advance their case that they are entitled to a larger share including the half share of the deceased 1st defendant by virtue of a Will and also the alternative request to withdraw the suit and institute a fresh suit as well. If any of the two reliefs is not granted to them, it will be against justice, equity and fair play. For all the above stated reasons, this Court finds that the order of the Court below is unjust and is unsustainable and is hence, liable to be set aside.

14. In the result, the Civil Revision Petition is allowed and the order, dated 03.09.2016, of the learned Principal Senior Civil Judge, Mahabubnagar, passed in I.A.No.40 of 2016 in O.S.No.159 of 2007 is set aside and as a sequel the said interlocutory application is allowed permitting the plaintiffs to withdraw the suit, however, reserving liberty to the plaintiffs to institute a fresh suit.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

11th April, 2017
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