

THE HON'BLE SRI JUSTICE SANJAY KUMAR

I.A.NO.2 OF 2018 IN C.R.P.NO.656 OF 2018

AND

CIVIL REVISION PETITION NO.656 OF 2018

COMMON ORDER

I.A.No.2 of 2018 was filed in this revision seeking permission to allow petitioner 3, defendant 13 in the suit, to appear and act on behalf of her son, petitioner 2, defendant 1 in the suit, who is stated to be residing in the United States of America. In the light of the averments made in the supporting affidavit and the general power of attorney dated 28.04.2010, placed on record, the I.A. is ordered and petitioner 3 is permitted to represent petitioner 2.

This civil revision petition under Section 115 CPC arises out of the order dated 11.12.2017 passed by the learned II Additional District Judge, Ranga Reddy District at L.B.Nagar, in I.A.No.1927 of 2014 in O.S.No.107 of 2011. The petitioners are defendants 3, 1 and 13 respectively in the said suit and they filed the subject I.A. under Order 14 Rule 2 CPC praying that the trial Court take up Issue No.4 framed in the suit as a preliminary issue and decide the same. By the order dated 11.12.2017, the trial Court held against them and dismissed the I.A.

By order dated 16.02.2018, this Court, having noted that the order under revision reflected that the trial Court was guided by one stray entry in the pahani for the year 1954-55, observed that the question as to whether the preliminary issue should have been decided required examination and granted interim stay of further proceedings in the suit.

Heard Sri K.Bikshapathy, learned counsel representing Sri D.Sudershan Rao, learned counsel for the petitioners/defendants 3, 1 and 13, and Sri P.Ravishankar, learned counsel for respondents 11 to 13/

plaintiffs 2 to 4. Respondent 1/ plaintiff 1 is deceased, as per the cause title, and respondents 2 to 10 are shown as not necessary parties to this revision.

Parties shall hereinafter be referred to as arrayed in the suit.

O.S.No.107 of 2011 was filed for the following reliefs:

'1. ...a preliminary decree declaring that the plaintiffs.no.2 to 4 are being legal heirs of plaintiff no.1 i.e., Late M.Shyam Sunder and defendant no.1 to 3 are having 50% share, equally amount themselves, in respect of the suit schedule property and defendants no.4 to 12 shall not have any right for partition and separate possession in respect of the said property.

2. Final decree be passed in pursuance of preliminary decree by dividing the suit schedule property into 2 shares by meets and bounds taking the value of the property into consideration and deliver the plaintiffs no.2 to 4 being legal heirs of plaintiff no.1 i.e., late M.Shyam sunder their respective share and keep them in separate possession thereof.

3. To grant perpetual injunction restraining all the defendants from alienating, encumbering, inducing third parties changing the nature of suit schedule properties in any manner whatsoever.

4. Costs of the suit be awarded.

5. Any other relief or reliefs to which the plaintiff is entitled may be passed as this Hon'ble Court deems fit and proper in the circumstances of the case and in the interest of justice.'

The suit schedule property is agricultural land admeasuring Ac.1.14 gts. in Sy.No.37; Ac.1.12 gts. in Sy.No.38; and Ac.3.07 gts. in Sy.No.39, totally admeasuring Ac.5.33 gts., situated at Pet-Basheerbagh Village, Quthbullapur Mandal, Ranga Reddy District.

The plaint averments are to the effect that M.Jairam Rao, the father of deceased plaintiff 1, and one M.Venkateswara Rao were the joint owners of the suit schedule property, as evidenced by the revenue record of 1954-55. Mandal Laxmaiah, the common ancestor of defendants 4 to 12, was the protected tenant in the suit schedule property. Venkateswara Rao sold his undivided share in the suit schedule property to P.Madan Mohan under Registered Document No.3135 of 1964 dated 02.11.1964. When the revenue authorities issued a notice calling for objections when they proposed to carry out mutation in the revenue records pursuant to the said sale,

Mandal Yellaiah and Mandal Yettaiah, the legal representatives of the protected tenant, Mandal Laxmaiah, raised objections seeking occupancy rights under the Andhra Pradesh (Telangana Area) Tenancy and Agricultural Lands Act, 1950 (*for brevity*, 'the Act of 1950'). They however failed upto the Supreme Court. Plaintiffs 2 to 4, being the legal representatives of Shyam Sundar, the deceased plaintiff 1, claimed that they were unaware of all the proceedings, including the matter that was carried upto the Supreme Court. They further stated that Mandal Yellaiah, the legal representative of Mandal Laxmaiah, the deceased protected tenant, died leaving behind Mandal Sadanandam, defendant 4, and Mandal Nagaraj, defendant 5. Mandal Yettaiah, the other son of Mandal Laxmaiah, the protected tenant, also died and Mandal Venkatesh, defendant 6, and Mandal Naveen, defendant 7, were stated to be his legal representatives. Defendants 1 to 3 and defendant 13 are the legal heirs of late P.Madan Mohan. When the legal heirs of late Mandal Laxmaiah secured an order from the Mandal Revenue Officer, Quthbullapur Mandal, for grant of succession of protected tenancy rights under Section 40 of the Act of 1950, defendants 1 to 3 appealed to the Joint Collector, Ranga Reddy District, and the appeal was allowed, by order dated 29.03.2005. The said order was confirmed by the High Court, *vide* order dated 06.06.2007 in C.R.P.No.3056 of 2005. The Special Leave Petition filed before the Supreme Court was also dismissed on technical grounds on 26.11.2007.

It is the case of the plaintiffs that as the suit schedule property was the joint property of Jairam Rao and Venkateswara Rao, plaintiff 1, the son of Jairam Rao, inherited his father's share, being his only son. They further stated that they waited till the Supreme Court disposed of the matter, but the defendants did not accede to their request for partition and separate

possession of their share. It is in these circumstances that they claimed to have filed the subject suit.

Upon filing of the written statement in the suit by the contesting defendants, the trial Court settled the following issues for trial:

- '1. Whether the plaintiff is entitled to seek partition of the suit schedule properties as prayed for?
2. Whether the plaintiff is entitled to seek perpetual injunction as prayed for?
3. Whether D4 to D12 are proper and necessary parties to the suit?
4. Whether the Civil Suit is barred by any law?
5. Whether the Court Fee paid by the plaintiff is correct and whether the property is valued properly for the purpose of valuation?

To what relief?

It is at this stage that defendants 3, 1 and 13 filed the subject I.A. under Order 14 Rule 2 CPC praying that the trial Court should take up Issue No.4 as a preliminary issue as it went to the root of the matter.

In their counter to the said I.A., plaintiff 2, speaking for himself and the other plaintiffs, stated that a suit barred by limitation could not be said to be a suit barred by any law and therefore, Issue No.4 would have no role to play in the context of the plea of defendants 3, 1 and 13 that the suit was barred by law. He pointed out that a mixed question of law and fact could not be taken up as a preliminary issue and as the issue of limitation cannot be determined without a proper trial, the plea of defendants 3, 1 and 13 to consider the said issue as a preliminary one warranted no consideration.

Perusal of the order under revision reflects that the trial Court was of the opinion that when the Pahani of 1954-55 recorded the name of Jairam Rao as the joint owner, the question as to whether he and his legal representatives have any right or not is a fact to be decided in the suit. The trial Court further observed that unless and until Jairam Rao's title was not decided, the contention of defendants 3, 1 and 13 that the suit was barred by limitation could not be decided as a preliminary issue. Adverting to the

fact that the claim of defendants 3, 1 and 13 was that Madan Mohan, their predecessor-in-title, had purchased the entire property from the legal representatives of Venkateswara Rao, the co-owner, and not from Jairam Rao, the trial Court held the right and title of Jairam Rao could not be decided at this stage. The trial Court further opined that in the event the claim of defendants 3, 1 and 13 was adverse to the claim of the plaintiffs, that aspect had to be proved by them along with their possession over the suit schedule property. Having stated so, the trial Court surprisingly went on to state that as defendants 3, 1 and 13 were claiming under a sale deed executed by the co-joint owner, they could not claim any adverse possession. It is on the strength of this reasoning that the trial Court held that there were no merits in the plea of defendants 3, 1 and 13 that Issue No.4 should be taken up as a preliminary issue and dismissed the I.A.

It is relevant to note that Section 3 of the Limitation Act, 1963, postulates that every suit instituted after the prescribed period shall be dismissed, although limitation has not been set up as a defence. It is therefore incumbent upon the trial Court to look into this issue, notwithstanding the fact that the defendant in the suit may not have raised the plea that the suit is barred by limitation.

Order 14 Rule 2 CPC reads as under:

'Court to pronounce judgment on all issues:-- (1) Notwithstanding that a case may be disposed of on a preliminary issue, the Court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.

(2) Where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to,--

(a) the jurisdiction of the Court, or

(b) a bar to the suit created by any law for the time being in force,

and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue.'

It is therefore clear that in terms of the aforestated provision, if a bar to the suit is created by any law for the time being in force, it would be within the power of the trial Court to dispose of such suit on that issue by trying that issue first.

Sri K.Bikshapathy, learned counsel, advanced cogent arguments in support of his plea that the trial Court ought not to have disallowed the plea of his clients to take up Issue No.4 as a preliminary issue under Order 14 Rule 2 CPC. He would point out that the plaint averments clearly showed awareness of the plaintiffs that the sale transaction in favour of the predecessor-in-title of defendants 3, 1 and 13 dated back to the year 1964. He would state that even if the legal representative of Jairam Rao was a minors at that point of time, he could at best have treated the said sale transaction as voidable and ought to have taken measures to seek invalidation of the same within three years of attaining majority. He would further state that though limitation would ordinarily be treated as a mixed question of law and fact, the case on hand does not fall in that category, as the suit being barred by time was manifest on the face of it. He would rely on the observations of the Supreme Court in PUROHIT AND COMPANY V/ s. KHATOONBEE¹ in the context of a dead claim being raised. In that case, the accident occurred on 02.02.1977 and the claim for compensation in relation thereto was made 28 years later on 23.02.2005.

He would also place reliance on KAMLESH BABU V/ s. LAJPAT RAI SHARMA², wherein the Supreme Court observed as under:

'17. It is well settled that Section 3(1) of the Limitation Act casts a duty upon the court to dismiss a suit or an appeal or an application, if made after the prescribed period, although, limitation is not set up as a defence.

¹ (2017) 4 SCC 783

² (2008) 12 SCC 577

18. In the instant case, such a defence has been set up in the written statement though no issue was framed in that regard. However, when the trial court had in terms of the mandate of Section 3(1) come to a finding that the suit was barred by limitation, it was the duty of the first appellate court and also of the High court to go into the said question and to decide the same before reversing the judgment of the trial court on the various issues framed in the suit. Even though the various issues were decided in favour of the plaintiff, both by the first appellate court and the High court, the same were of no avail since the suit continued to remain barred under Article 59 of the Limitation Act, 1963.'

Lastly, he placed reliance on ABDUL RAHMAN V/ s. PRASONY BAI³, wherein the Supreme Court observed that in terms of Order 14 Rule 2 CPC, a civil Court can dispose of a suit on a preliminary issue and it is neither in doubt nor in dispute that the issue of *res judicata* /constructive *res judicata* as also the maintainability of the suit can be adjudicated upon as preliminary issues.

Sri P.Ravishankar, learned counsel, does not dispute the fact that the plaint averments disclose knowledge on the part of the plaintiffs of the sale transaction of 1964, whereunder defendants 3, 1 and 13 claim title.

In CHINTALA NARASIMHA REDDY V/ s. B.SATYANARAYANA⁴, this Court had occasion to consider a similar issue. Therein, the defendants filed an application under Order 7 Rule 11 CPC seeking rejection of the plaint on the ground that the suit was barred by limitation. The trial Court however disallowed their plea. In this context, this Court noted that in HARDESH ORES (P) LTD. V/ s. HEAD AND COMPANY⁵, the Supreme Court observed that 'law' within the meaning of Order 7 Rule 11(d) CPC included the law of limitation and that in C.NATRAJAN V/ s. ASHIM BAI⁶, it was noted that the question whether a suit is barred by limitation or not would

³ AIR 2003 SC 718

⁴ 2017 (5) ALD 189

⁵ (2007) 5 SCC 614

⁶ (2007) 14 SCC 183

depend upon the facts and circumstances of each case. The issue of limitation being a mixed question of law and fact, this Court held that unless there remains not even an iota of doubt as to the suit being barred by limitation, such a ground could not be pressed into service for rejection of the plaint. On facts, in that case, this Court held that upon a mere reading of the plaint, it was clear that the suit was barred by limitation on the face of it and held in favour of the defendants.

In that view of the matter, it cannot be baldly summed up that in each and every case where the plea of limitation is raised, it would require an enquiry on facts entailing a full-fledged trial before a decision could be taken on the issue. It may well be possible that the plaint itself demonstrates that the suit claim is barred by time. The case on hand is eminently suitable for verification as to whether this principle would apply. Therefore, the trial Court ought to have accepted the plea of defendants 3, 1 and 13 that Issue No.4 should be taken up as a preliminary issue in terms of Order 14 Rule 2 CPC. The order under revision holding to the contrary is therefore unsustainable and is accordingly set aside. The trial Court shall take up Issue No.4 framed in the suit as a preliminary issue under Order 14 Rule 2 CPC and proceed to decide the same in accordance with law.

The civil revision petition is allowed. I.A.No.2 of 2018 filed in this revision is also allowed. Other pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.

SANJAY KUMAR, J

27th JULY, 2018

Sv