

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.1284 of 2014

O R D E R:

This Revision is filed under Article 227 of the Constitution of India challenging the order dt.12.03.2014 in I.A.No.439 of 2013 in O.S.No.646 of 2008.

2. Petitioners are defendants 10 to 12 in the suit.

3. The said suit was filed by respondents 2 and 3 against petitioners and others for partition of plaint schedule property and for allotment of 2/4th share to them. They alleged that the plaint schedule property belongs to the father of respondents 2 and 3, who died in 1972; that the brothers of respondents 2 and 3 are 4th respondent(1st defendant) and one E.Rama Krishna, who died in the year 2002; that respondents 5 to 9/defendants 2 to 6 are the children of E.Rama Krishna; that the plaint schedule property is the ancestral property of respondents 2 to 9; that respondents 2 and 3 have 2/4th share in the plaint schedule property; that respondents 4 to 9 had executed certain documents in favour of petitioners and respondents 10 to 12, and brought into existence certain ante-dated documents; and that notwithstanding the execution of said documents, respondents 2 and 3 are in joint possession of the suit schedule property as co-owners.

4. Petitioners filed written statement opposing the suit claim and contending that though the father of the respondents 2 & 3/plaintiffs was the original owner of the plaint schedule property, there was a sale by the father of respondents 2 & 3 to one Bansilal on 24.02.1966; that after purchase late Bansilal remained in exclusive possession and enjoyment of the suit land and also filed a Declaration dt.10.04.1975 under the Andhra Pradesh Land Reforms (Ceiling on Agricultural Holdings) Act, 1973 wherein he included the suit schedule properties in his holdings apart from other lands; that these lands were computed to the holdings of the Bansilal; that he died in 1978 and his legal heirs sold to one Akhtarunnisa Begum an extent of Acs.4.00gts in Survey No.380 on 29.09.1995, Acs.2.00gts in Survey No.380 to Kamaluddin Hamed Salmani(1st petitioner) on 29.09.1995, Acs.6.00 gts in Survey No.380 to Badruddin Hussain Salmani(2nd petitioner) and Abdul Aleem Habeeb Salmani(3rd petitioner) on 31.10.1995, and Acs.2.27 gts in Survey No.380 to the same persons under another registered sale deed dt.20.12.1995. Reference is also made to other sale deeds executed on 18.09.1996 in respect of Acs.2.31 gts in survey No.382 to Kamaluddin Hamed Salmani(1st petitioner) and another sale deed dt.18.09.1996 with respect to Acs.2.07 gts to Abdul Sattar Salman. It is contended that respondents 2 and 3 had suppressed these facts and came to the Court with unclean hands and that the suit is also barred by limitation.

5. Pending suit, 1st respondent, by name J.Balaiah, filed I.A.No.439 of 2013 under Order I Rule 10 CPC to implead himself as 13th defendant in the suit. He contended that his grandfather by name J.Musalaiah had agricultural land in Rissalagandi village but the said village got submerged due to formation of Himayath Sagar tank and there was a grant on 03.04.1921 by the Government of Inzam-e-Deccan of an upper portion of the mountain by name Bhoom Banda admeasuring Acs.18.00 gts of land to his grand father and his father Pochaiah; that on the death of his grandfather and father, he succeeded to the said land; and the father of respondents 1 and 2 who also lost his land during the construction of Himayath Sagar tank was allotted Acs.18.00 gts of land on Bhoom Banda on 03.04.1921; that the 1st defendant misled them into thinking that the suit for partition is filed in respect of other land, but in fact the 1st respondent came to know that it was the land allotted to his grandfather which was subject matter of the suit for partition when he consulted retired Revenue Officials; that respondents 2 and 3 have no right over said land allotted to his grandfather; and so he should be impleaded as a party in the suit.

6. The respondents 2 and 3/plaintiffs did not file any counter opposing the said application though they are plaintiffs in the suit and are *dominus litis*.

7. Petitioners herein opposed the said I.A.No.439 of 2013 denying the right, title and interest of the proposed party in the

suit schedule property and opposed his impleadment in the suit. It was contended that the suit being one for partition filed by respondents 2 and 3, 1st respondent's rights cannot be adjudicated therein and he has to independently get his rights adjudicated in separate proceedings and only to avoid payment of Court fee he has filed the implead application.

8. The relationship of 1st respondent with J.Musalaiah was denied. The circulars, on the basis of which the 1st respondent sought impleadment, were also contended to be not proven correct and it is asserted that no records were filed by the proposed parties in the form of pahanies, ROR, Pattadar Passbook, etc., to show semblance of any right. It is also contended that the application for impleadment was filed by the 1st respondent in collusion with respondents 2 and 3, and the document dt.03.04.1921 filed by the 1st respondent was a forged and fabricated document.

9. By order dt.12.03.2014 I.A.No.439 of 2013 was allowed by the Court below. It observed that whether the documents filed by the proposed party are genuine are not, whether they confer any title over any portion of the suit schedule property or not, is a matter to be decided on full-fledged trial and no conclusion can be drawn on the claim of the 1st respondent at the stage of impleadment. It observed that in view of the assertion of title and possession over certain portion of the suit schedule property by the 1st respondent, he is entitled to be impleaded as a party in the

suit; and only on the basis of the pleas of the petitioners, he cannot be shut out from participating in the proceedings. It also observed that it would avoid multiplicity of proceedings and comprehensive decision can be taken over the rights of all the parties, if the 1st respondent is impleaded as a party in the suit.

10. Assailing the same, this Revision is filed.

11. Though one P.Ashok, Counsel filed appearance for respondents 13 to 17, there is no representation on his behalf. Respondents 2 to 12 have been served.

12. Counsel for the petitioners contended that the Court below erred in impleading the 1st respondent as a party defendant in the suit since he is a third party to the suit and his claim to the property, which is subject matter of the suit, cannot be adjudicated in the instant suit, and he should have filed separate suit for declaration of his title to the suit schedule property, particularly, when he did not specifically plead that he is in possession thereof. He also contended that the documents filed by the 1st respondent did not establish his right, title and interest in the plaint schedule property. He also contended that no *prima facie* material was placed on record by the 1st respondent in support of his plea of having right, title or interest in the suit schedule property. He also contended that by impleading the 1st respondent as defendant in the suit, the Court had introduced a

new cause of action wherein his rights would also have to be adjudicated, and this alters the nature of the suit claim.

13. Counsel for the petitioners also relied upon the decisions in ***Mumbai International Airport Private Limited v. Regency Convention Centre and Hotels Private Limited and others***¹ and ***Kasturi v. Iyyamperumal and others***².

14. Before I deal with the contentions and those two decisions cited by the counsel for petitioners, it is important to notice the decision of the Supreme Court in ***Rangammal v. Kuppuswami and another***³.

15. The said case was in the context of a suit for partition wherein the appellant before the Supreme Court contended that she was not made a party to the suit for partition though her property was included in the said suit. The appellant was impleaded in the partition suit, but her claim was negatived and the suit was decreed in favour of the 1st respondent and appeals filed by the appellant before the first Appellate Court as well as the High Court were dismissed. The Supreme Court reversed the decisions of all the three Courts and observed as under:

“28. When Respondent 1-plaintiff, Kuppuswami came with a specific pleading for the first time in a partition suit that the appellant's share had been sold out by her de facto guardian Kumara Naicker without even the permission of

¹ 2010(7) SCC 417

² AIR 2005 SC 2813

³ 2011(12) SCC 220

the court, it was clearly Respondent 1-plaintiff who should have discharged the burden that the same was done for legal necessity of the minor in order to discharge the debt which the deceased mother of the appellant was alleged to have been owing to some one. When the Respondent 1-plaintiff failed to discharge this burden, the question of discharge of burden to disprove the sale deed by the appellant-second defendant Rangammal do not arise at all as per the provisions of Evidence Act.

45. It hardly needs to be highlighted that in a suit for partition, it is expected of the plaintiff to include only those properties for partition to which the family has clear title and unambiguously belong to the members of the joint family which is sought to be partitioned and if someone else's property, meaning thereby disputed property is included in the schedule of the suit for partition, and the same is contested by a third party who is allowed to be impleaded by order of the trial court, obviously it is the plaintiff who will have to first of all discharge the burden of proof for establishing that the disputed property belongs to the joint family which should be partitioned excluding someone who claims that some portion of the joint family property did not belong to the plaintiff's joint family in regard to which decree for partition is sought."

16. Therefore, if someone's property is included in the schedule of the suit for partition and the same is contested by a third party like the 1st respondent herein, there is nothing wrong in

impleading the said third party to the suit for partition instead of driving him to file a separate suit; and the plaintiffs in the suit for partition should be made to discharge the burden of proof of first establishing that the disputed property belonged to the joint family and it should be partitioned.

17. Coming to the decisions in **Mumbai International Airport Private Limited's** case(1 supra) and **Kasturi's** case(2 supra) cited by the counsel for petitioners, the suits in question in those cases were suits for specific performance and third parties wanted to get impleaded therein. The observations therein have to be understood in the context of the nature of the suit i.e., the suit being one for specific performance, and more particularly, in the light of Section 19 of the Specific Relief Act, 1963 and cannot be extended to cover suits for partition, like the instant one, which are directly covered by the decision in **Rangammal's** case(3 supra).

18. Counsel for petitioners also relied upon the decision in **Shub Karan Bubna @ Shub Karan Prasad Bubna v. Sita Saran Bubna and others**⁴ wherein the Supreme Court observed in paras 5 to 7 as under:

“5. ‘Partition’ is a re-distribution or adjustment of pre-existing rights, among co-owners/coparceners, resulting in a division of lands or other properties jointly held by them, into different lots or portions and delivery thereof to the respective allottees. The effect of such division is that the

⁴ 2009(9) SCC 689

joint ownership is terminated and the respective shares vest in them in severalty.

6. A partition of a property can be only among those having a share or interest in it. A person who does not have a share in such property cannot obviously be a party to a partition. 'Separation of share' is a species of 'partition'. When all co-owners get separated, it is a partition. Separation of share/s refers to a division where only one or only a few among several co-owners/coparceners get separated, and others continue to be joint or continue to hold the remaining property jointly without division by metes and bounds. For example, where four brothers owning a property divide it among themselves by metes and bounds, it is a partition. But if only one brother wants to get his share separated and other three brothers continue to remain joint, there is only a separation of the share of one brother.

7. In a suit for partition or separation of a share, the prayer is not only for declaration of plaintiff's share in the suit properties, but also division of his share by metes and bounds. This involves three issues:

- (i) whether the person seeking division has a share or interest in the suit property/properties;
- (ii) whether he is entitled to the relief of division and separate possession; and (iii) how and in what manner, the property/properties should be divided by metes and bounds?

In a suit is for partition or separation of a share, the court at the first stage decides whether the plaintiff has a share in the suit property and whether he is entitled to division and separate possession. The decision on these two issues is exercise of a judicial function and results in first stage decision termed as 'decree' under Order 20 Rule 18(1) and termed as 'preliminary decree' under Order 20 Rule 18(2) of the Code. The consequential division by metes and bounds, considered to be a ministerial or administrative act requiring the physical inspection, measurements, calculations and considering various permutations/

combinations/alternatives of division is referred to the Collector under Rule 18(1) and is the subject matter of the final decree under Rule 18(2).”

19. While broadly the contents of the above paragraphs lay down what is the nature of a suit for partition, there was no occasion for the Supreme Court in that case to deal with a situation like the instant one, where property which was alleged to be not joint family property was included in the schedule in a suit for partition, thereby affecting the third party rights. Therefore, this judgment also cannot be of any assistance to the counsel for petitioners.

20. From the material on record, it is not disputed that certain documents have also been filed by the 1st respondent in support of his claim of title to the suit schedule property. No doubt they have not been marked by the Court below but they have been referred to in the impugned order.

21. Merely because the Court below did not choose to mark the said documents, though it has considered the same and it did not express any opinion on them, the petitioners cannot be granted any relief in the Revision.

22. In my considered opinion, after impleadment of the 1st respondent and his L.Rs. in the suit, during the course of trial, the Court has to see what material is placed on record in support of his claim. At the stage of impleadment of the 1st respondent,

Court below did not rightly express any opinion on the validity of the claim of the 1st respondent.

23. I therefore do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court with the impugned order in exercise of power conferred on this Court under Article 227 of the Constitution of India.

24. Accordingly, this Civil Revision Petition is dismissed. No order as to costs.

25. Consequently, miscellaneous petitions pending if any shall stand dismissed.

17th June, 2019.

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M.S. RAMACHANDRA RAO, J

