

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.1221 of 2018

ORDER:

This Revision is filed assailing the order dt.19-01-2018 in I.A.No.852 of 2017 in O.S.No.28 of 2017 of the XXV Additional Chief Judge, City Civil Court at Hyderabad.

2. Petitioners herein are defendants in the said suit.
3. The suit was filed by respondent for partition of the plaint schedule properties into three equal shares and for delivery of possession of one such share to the respondent.
4. While the suit was pending, petitioners herein filed I.A.No.852 of 2017 under Order VII Rule 11 C.P.C. to reject the plaint on the ground that there was a suit filed by 2nd petitioner in O.S.No.692 of 2016 before the II Senior Civil Judge, City Civil Court, Hyderabad for recovery of possession against respondent which was suppressed by respondent; that earlier there was also a suit O.S.No.122 of 2007 filed for partition before the II Additional Chief Judge, City Civil Court, Hyderabad by sister-in-law of the respondent and 2nd petitioner, which was dismissed on 29-04-2016; and the respondent in his written statement filed therein and in his evidence as D.W.2 in O.S.No.122 of 2007 made a statement that there were no joint family properties existing. It is therefore contended that the respondent could not have

filed the instant suit for partition when he himself admitted that there was no joint family property existing.

5. Counter-affidavit was filed by respondent opposing this application contending that the contentions now raised by petitioners are outside the scope of application under Order VII Rule 11 C.P.C. It was also contended that O.S.No.120 of 2007 had nothing to do with the respondent's suit, and it was pointed out that the said suit was rejected on the ground that plaintiff therein had remarried, and the Court fee paid was not correct because she was out of possession. It was denied that the suit schedule properties are not joint family properties and it is contended that the judgment in O.S.No.122 of 2007 does not operate as *res judicata*.

6. By order dt.19-01-2018, the Court below dismissed I.A.No.852 of 2017. It observed that Section 11 of C.P.C. does not bar filing of suit, but it only precludes from trying the dispute that was adjudicated in the earlier suit, and the plaint in O.S.No.28 of 2017 cannot be rejected on the ground that the suit is allegedly barred by *res judicata*. It also held that decision on *res judicata* is a question of fact and that it cannot be gone into in an application under Order VII Rule 11 C.P.C. It followed the decision of the Supreme Court in **Kamala and others Vs. K.T. Eshwara Sa and others**¹. It also held that suppression of filing of O.S.No.692 of 2016 against respondent for

¹ 2008(4) ALD 24 (SC)

recovery of possession is also not a ground to reject the plaint under Order VII Rule 11 C.P.C.

7. Challenging the same, this Revision is filed.

8. Heard the learned counsel for petitioners and learned counsel for respondent.

9. Though learned counsel for petitioners sought to contend that the suit O.S.No.28 of 2017 is barred by *res judicata* in view of the judgment rendered in O.S.No.122 of 2007, as rightly held by the Court below, plea of *res judicata* requires consideration of pleadings in the earlier suit, evidence recorded in the earlier suit and the judgment therein; the decision on *res judicata* would be a question of fact; and such question cannot be gone into an application under Order VII Rule 11 C.P.C. particularly when Section 11 C.P.C. does not prohibit filing of suit.

10. I therefore do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court in exercise of its power under Article 227 of the Constitution of India.

11. Accordingly, the Revision fails and it is dismissed.

12. However, the Court below shall expedite disposal of the said suit. No costs.

13. As a sequel, the miscellaneous petitions, if any pending, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 18-02-2019
Vsv

