

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.4529 of 2017

ORDER :

This Revision is filed under Article 227 of the Constitution of India challenging the order dt.01-06-2017 in I.A.No.982 of 2013 in O.S.No.644 of 2013 of the Principal District Judge, Ranga Reddy District at L.B. Nagar, Hyderabad.

2. Petitioners herein are defendant Nos.1 to 5 in the said suit.

Plea of the respondent/plaintiff

3. The respondent herein filed the said suit against petitioners to declare that she and 5th petitioner are absolute owners of suit 'A' and 'B' schedule properties and consequently to cancel the gift settlement deeds dt.18-05-2004 and 25-05-2004 executed by 1st petitioner in favour of 2nd petitioner and by 3rd petitioner in favour of 4th petitioner and also for recovery of possession of 'A' and 'B' schedule properties to respondent and 5th petitioner.

4. It is the contention of the respondent that one B.Radhamma was the owner of land in Sy.No.594 of extent Ac.10.08 gts; that she executed a registered Will in favour of biological father of respondent by name S.P.Bhaskar Rao on 02-02-1976 bequeathing all her property and also in favour of Smt.Indira Devi, Smt.Boodevi and Sri B.Ramachander Rao; that S.P.Bhaskar Rao gave registered G.P.A. in favour of his brother late B.Ramachander Rao on 26-04-1976; that

respondent was gave in adoption by S.P.Bhaskar Rao to B.Ramachander Rao in 1963; and 5th petitioner, who is the son of M.Bhupathi Rao, was also adopted by B.Ramachander Rao. She contended that S.P.Bhaskara Rao died on 31-01-2010 and B.Ramachander Rao died on 06-04-2003 and that respondent succeeded to the property of S.P.Bhaskar Rao as per his Will dt.18-07-2009 and so she sought partition from the 5th petitioner.

5. She contended that 5th petitioner did not respond for partition and so respondent filed O.S.No.87 of 2011 before the I Additional District Judge, Ranga Reddy District and the same is now transferred to the XIII Additional District Judge, Ranga Reddy District at L.B. Nagar and is pending. She contended that she and the 5th petitioner had succeeded to the property of B.Radhamma and S.P. Bhaskar Rao.

6. She alleged that 1st petitioner executed a gift deed on 18-05-2004 in favour of 2nd petitioner in respect of 'A' schedule property claiming that 'A' schedule property was acquired by 1st petitioner towards his share in the ancestral property; 3rd petitioner executed gift deed on 25-05-2004 in favour of 4th petitioner in respect of 'B' schedule property and 3rd petitioner also claims that it is his ancestral property.

7. She alleged that petitioner Nos.1 and 3 do not have any right in 'A' and 'B' schedule properties and they have brought into existence the said gift settlement deeds only to lay claim over the suit schedule

properties. According to her, only herself and 5th petitioner are the original owners of the said property.

Plea of the petitioners/defendants

8. Petitioner Nos.1 to 4 filed a Written Statement opposing the suit claim. They contended that respondent had filed O.S.No.87 of 2011 before the District Judge, Malkajgiri, to which 5th petitioner is a party for partition of various properties including the property which is the subject matter of the instant suit. They contended that the instant suit is barred under Order II Rule 2 C.P.C.

9. They contended that 5th petitioner is the natural brother of M.Lakshmikantha Rao, father of 3rd petitioner and husband of 4th petitioner. They contended that 5th petitioner was taken in adoption by late B.Ramachander Rao and Smt.Bhoodevi and the later is the natural daughter of Smt.B.Radhamma, the original owner of the properties in Sy.No.594 of Alwal village. They contended that 1st petitioner is the father of 2nd petitioner and 2nd petitioner is also the daughter-in-law of late 4th petitioner.

10. According to them, late B.Ramachander Rao was taken as illatom son-in-law by B.Radhamma during her life time and she gave various properties in Alwal including the land in Sy.No.594, and his name was included as pattadar and possessor in Khasra Pahani for the year 1954-55. They contended that a layout was got prepared on 11-02-1967 by late B.Ramachandra Rao, and in the said layout, the

2nd petitioner owns plot No.67 and 4th petitioner owns plot No.115. They contended that various plots in the layout comprising Sy.Nos.590, 591 and 594 (part) admeasuring 50889 Sq. yds had already been alienated in favour of third parties and in some of them buildings were also constructed.

11. They contended that late B.Ramachander Rao, after making a layout, executed a Power of Attorney in favour of one A.Premanandam for dealing with the plots in the layout giving the latter full power and authority to deal with the plots in the layout. According to them, the said A.Premanandam entered into an agreement of sale dt.26-07-1996 in favour of 1st petitioner agreeing to sell plot No.67 and 117 admeasuring 506 sq. yds and another agreement of sale dt.19-01-1997 in favour of 3rd petitioner agreeing to sell plot Nos.16, 17, 18, 20 and 115 but regular sale deeds were not executed. According to them, the said Power of Attorney executed by late B.Ramachander Rao in favour of A.Premanandam was not available at the moment.

12. They also alleged that subsequently gift settlement deeds were executed by 1st petitioner in favour of 2nd petitioner and 3rd petitioner in favour of 4th petitioner and they obtained sanction from the GHMC and made constructions in the property.

13. They also raised a plea that the suit is barred by limitation since from 1954-55 the name of B.Ramachander Rao was recorded as

pattedar and possessor in Khasra Pahani and B.Radhamma died on 22-03-1976.

The I.A.No.982 of 2013 under Or.VII Rule 11(a) and (d) CPC

14. Pending suit, petitioners filed I.A.No.982 of 2013 under Order VII Rule 11(a) and (d) C.P.C. seeking rejection of plaint in O.S.No.644 of 2013.

15. According to them, the plaint ought to be rejected since the respondent had already filed O.S.No.87 of 2011 before the VI Additional District Judge, Malkajgiri, Ranga Reddy District against the 5th petitioner, his 3 sons, wife and third parties for partition of certain properties including the land in Sy.No.594, which is subject matter of the instant suit. According to them, cause of action for filing O.S.No.87 of 2011 as well as in the instant suit arose out of the same set of facts, that nature of evidence which is required to be let-in in both the suits would be one and the same, and so the suit is barred under Order II Rule 2 C.P.C.

The stand of the respondent

16. Counter-affidavit was filed by respondent opposing the above application. In the counter-affidavit, the respondent contended that petitioners claim to have right over the suit schedule property by virtue of agreements of sale and sale deeds yet to be executed and that the agreement of sale was executed by A.Premanandam, alleged to be G.P.A. of B.Ramachander Rao, but even according to the petitioners,

the said G.P.A. is not available. She contended that therefore petitioner Nos.1 to 4 have no right at all over the suit schedule property.

17. She denied that the cause of action for filing O.S.No.87 of 2011 as well as the present suit arose out of the same set of facts. She contended that the cause of action for filing O.S.No.87 of 2011 is different from the cause of action in the present suit and that the relief was sought in O.S.No.87 of 2011 for partition of the suit schedule property in view of the silence maintained by the 5th petitioner to the demand for partition made by her (respondent). She contended that cause of action for the instant suit is execution of gift settlement deeds dt.18-05-2004 and 23-05-2004 by 1st petitioner in favour of 2nd petitioner and 3rd petitioner in favour of 4th respondent to lay a claim over the suit schedule property without having any right therein. She contended that Order II Rule 2 C.P.C. is not at all attracted.

The Order of the Court below in I.A.No.982 of 2013

18. By order dt.01-06-2017, the Court below dismissed I.A.No.982 of 2013. It observed that the reliefs claimed in both the suits are different and even if it is accepted that in both the suits, the respondent is relying on Will deeds dt.02-02-1976 and 18-07-2009, cause of action for both suits would be different. It held that in O.S.No.87 of 2011, respondent is claiming partition and separate possession of the properties of her late biological father while the cause of action in the instant suit, according to respondent arose in

2013 when she came to know about the execution of gift settlement deeds mentioned above. It held that cause of action in the instant suit, according to plaint, arose in 2013 and it is not possible to include it in O.S.No.87 of 2011. It held that it is not possible to ascertain at this stage whether cause of action for both suits is one and the same and whether there was failure to include all the reliefs in the earlier suit and even otherwise since the nature of relief claimed is different, it is not possible to conclude that suit is barred under Order II Rule 2 C.P.C.

19. It observed that cause of action in O.S.No.87 of 2011 appears to be only against 5th petitioner, who being the adoptive son of B.Ramachander Rao and brother of respondent did not respond to her demand for partition while the cause of action in O.S.No.644 of 2013 is against petitioner Nos.1 to 4 and declaratory relief was sought in favour of respondent and 5th petitioner.

20. Assailing the same, this Revision is filed.

The Consideration by the Court

21. Learned counsel for petitioners contended that the Court below erred in refusing to reject the plaint and that Order II Rule 2 C.P.C. would clearly bar the instant suit O.S.No.644 of 2013.

22. Order II Rule 2 C.P.C. states:

“2. Suit to include the whole claim:-.

(1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court.

(2) Relinquishment of part of claim:- Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs:- A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs, but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any reliefs so omitted.

Explanation- For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action.”

23. The proviso to Order II Rule 2 C.P.C. indicates that if a plaintiff is entitled to several reliefs against the defendant in respect of the same cause of action, he cannot split up the claim so as to omit one part of the claim and sue for the other. If the cause of action is the same, the plaintiff has to place all his claims before the Court in one suit as Order II Rule 2 C.P.C. is based on the cardinal principle that defendant should not be vexed for the same cause. The essential

requirement of applicability of Order II Rule 2 C.P.C. is identity of causes of action in previous suit and the subsequent suit (**Deva Ram and another Vs. Ishwar Chand and another**¹).

24. Interpreting Order II Rule 2 C.P.C., the Supreme Court in **Bengal Waterproof Limited Vs. Bombay Waterproof Manufacturing Company and another**² held that before the second suit of the plaintiff can be held to be barred by the said provision, it must be shown that the second suit is based on the same cause of action on which the earlier suit was based; and if the cause of action is the same in both the suits, and if in the earlier suit plaintiff has not sued for any of the reliefs available to it on the basis of that cause of action, the reliefs which it had failed to press into service in that suit cannot subsequently prayed for except with the leave of the Court. It must, therefore, be shown by the defendants for supporting their plea of bar of Order II Rule 2 (3) C.P.C. that the second suit of the plaintiff is based on the same cause of action on which the earlier suit was based and because it has not prayed for any relief on the ground of passing off action and it had not obtained leave of the Court in that connection, it cannot sue for that relief in the second suit. It observed that to establish a plea of bar under Order II Rule 2 C.P.C. the defendants must file in evidence pleadings in the previous suit and prove to the Court the identity of causes of action in the two suits.

¹ (1995) 6 SCC 733

² (1997) 1 SCC 99

25. The cause of action in the instant suit, as can be seen from para-8 of the plaint is :

“8) Cause of Action:- The cause of action for the suit arose on which biological father of the plaintiff executed a Will dated 18-07-2009 which came to light after the death of her biological father on 31-01-2010 and on 02-05-2013 when the plaintiff came to know of execution of alleged Gift Settlement Deeds by the defendant 1 & 3 and cause of action continuing since the defendants are making construction over the suit schedule land.”

26. The cause of action in O.S.No.87 of 2011 is described by respondent as under:

“26) The cause of action for the suit arose when the plaintiff for the first time made an application to the Tahsildar, Malkajgiri Mandal, R.R. District claiming correction of Record of Rights in respect of Survey No.543 to an extent of Ac.2.16 guntas on 28-07-2008. The Tahsildar after putting the 1st defendant on notice and receiving his objections issued memo on 23-01-2009 stating that the dispute is of civil nature and advised the plaintiff to approach the competent court of law with regard to legal heirs of late Sri B.Ramachandra Rao. Thereafter the plaintiff got issued a notice to the defendant 1 to 5 and others on 11-05-2010 calling upon them to account for the properties left by late Smt.B.Radhamma in the hands of late Sri B.Ramachandra Rao and late Sri S.P. Bhaskar Rao and divide the same in to two equal shares and allot one such share to the plaintiff. Though the notices were received by the defendants 1 to 5 on 14-05-2010, they have chosen not to give any reply and hence the cause of action is still subsisting.”

27. As rightly held by the Court below, the cause of action for both the suits is different and in O.S.No.87 of 2011, the respondent is claiming partition and separate possession of the properties of her late

biological father S.P. Bhaskara Rao under a Will dt.18-07-2009 allegedly executed by him.

28. In the instant suit, however, she is seeking cancellation of gift settlement deeds dt.18-05-2004 and 25-05-2004 which she claims to have come to know on 02-05-2013.

29. *Prima facie*, the relief claimed in O.S.No.87 of 2011 is against 5th petitioner herein and his family members while the relief claimed in the instant suit is against petitioner Nos.1 to 4. Therefore, it cannot be said that cause of action in both the suits is one and the same.

30. Learned counsel for petitioners relied on decision in **M.Thimma Raju and another Vs. Dronamraju Venkatakrishna Rao and another**³ in support of his pleading that the instant suit is barred under Order II Rule 2 C.P.C. In that case, a suit for partition and separate possession of some lands was filed and during pendency of the suit, some of the properties were sold. The plaint was amended to bring the purchasers on record challenging their purchases, but the relief of recovery of possession against them was not sought and no Court Fee was paid and so it was not granted. Subsequently second suit against the purchasers was filed for possession. This Court held that the second suit between the same parties on the same cause of action was barred by Order II Rule 2 C.P.C. and also observed that the relief of possession which could have been sought in the previous suit, not having been sought, the second suit for the relief of possession

³ AIR 1978 AP 385

was barred by *res judicata*. It further held that the rule does not preclude a second suit based on a distinct and separate cause of action and for applicability of Or.II Rule 2, two conditions must be satisfied i.e. that the previous suit and the present suit must arise out of the same cause of action, and secondly, they must be between the same parties. It observed that if evidence to support the suits is different then causes of action are also different.

31. If we apply the said decision to the instant case, since the suits are not between the same parties (though 5th petitioner is common in both the suits) and since there is a distinct cause of action in the instant suit, I do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court under Article 227 of the Constitution of India with its order.

32. Accordingly, the Civil Revision Petition fails and it is dismissed.

33. However, both the suits O.S.No.644 of 2013 and O.S.No.87 of 2011 ought to be heard by the same Court to avoid conflicting decisions on the validity of the Wills in question. Therefore, O.S.No.644 of 2013 is transferred from the Court of the Principal District Judge, Ranga Reddy District at L.B. Nagar to the Court of XIII Additional District Judge, Ranga Reddy District at L.B. Nagar to be tried along with O.S.No.87 of 2011 pending on its file. No costs.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 11-07-2019

Vsv

