

HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

CIVIL REVISION PETITION No.5363 of 2018

ORDER:

This Revision is filed under Article 227 of the Constitution of India challenging the order dt.17-07-2018 in I.A. No.1186 of 2018 in O.S. No.825 of 2014 of the III Additional District and Sessions Judge, R.R. District at L.B. Nagar.

2. Petitioner herein is plaintiff in suit.

THE PLAINT

3. He filed the said suit against respondents for (a) partition of plaint schedule property as per the ratio mentioned in an agreement dt.22.04.1998 and delivery of shares by way of metes and bounds together with possession and for allotment of such share i.e., 25% share in 1,74,261 sq.yds to petitioner, and to the respondents as per the ratio mentioned in the said agreement of contract; and (b) for a perpetual injunction restraining respondents 1 to 6, 11 and 12 and their men from alienating the plaint schedule property to third parties, entering into sale agreements, other agreements in favour of third parties and also restraining them from altering the nature of the plaint schedule property and costs.

4. The plaint schedule consists of Ac.15.38 gts., in Survey No.208 and Ac.20.05 gts in Survey No.209 at Kondapur Village,

Serilingampally Mandal, Ranga Reddy District, within specified boundaries.

5. According to petitioner, respondent No.s 5 to 10 approached him and respondents 1 to 4 and informed him that their father Sri Thota China Seetharamaiah, S/o. Sriramulu purchased land of an extent of Ac.95.24 gts in Survey Nos.208 to 213 in Kondapur Village, Hyderabad, West Thaluk, Hyderabad under the registered sale deed bearing document Nos.664/61, 1261/B1 of 1961; that respondent No.s 5 to 10 have lands not only in this survey number but also in other survey numbers; that they informed the petitioner and respondent No.s 1 to 4 that their lands were acquired by the Government as surplus land and it was allotted to the Social Welfare Department and some lands were given to the 8th Battalion and that they are not in a position to get back their lands from the Government, since they have no financial capacity and have no legal knowledge; that negotiations took place in February, 1998 between the petitioner and respondent No.1 on one hand *and* respondents 5 to 10 on the other hand; on 20.04.1998 negotiations again took place between the parties.; respondents 5 to 10 informed petitioner and respondents 1 to 4 that they shall invest amounts with regard to filing of cases before different Courts by engaging efficient advocates and also spend time to attend Courts and office of the Revenue Department and *try to clear some portion of the said land* out of the entire extent of Ac.95.24 gts; and in return, proposals were made by the respondent

No.s 5 to 10 to give 60% share to the petitioner and respondent Nos.1 to 4 in the recovered lands and agreeing to take 40% share towards their share therein; and an agreement dt.22.04.1998 containing the said terms came into existence between them.

6. Petitioner contended that as per the terms of the said agreement, respondent No.s 5 to 10 got 40% share in the entire property and remaining 60% would go to the petitioner and respondents 1 to 4 as per the ratio mentioned in the said document; that the petitioner would get 20% of the share; at the time of the said agreement the respondent No.s 5 to 10 received Rs.50,000/- from the petitioner and the first respondent and gave receipt on that day and the payment was also mentioned in the said agreement; that subsequently in July, 1998 a further sum of Rs.50,000/- was also paid by petitioner and first respondent to the 9th respondent under a receipt; in August, 1998 respondents 5 to 10 approached the petitioner and the first respondent and informed that their share in the land would be reduced from 40% to 30% and there would be enhancement in the share of the petitioner and the respondent no.1 from 20% to 25%; thereafter, cases were filed by the petitioners/respondents 1 to 4 challenging orders passed by the Special Officer and Competent Authority under Urban Land Ceiling Act, 1976 and the matters were decided up to Supreme Court; thereafter, the respondents 5 and 6 got back Ac.17.16 gts., of land in Sy.No.208 and 209 of Kondapur village and Competent Authority under the Act gave physical possession of the said land to the

respondents 5 and 6 on 06.02.2008 but this was suppressed by the respondent Nos. 1, 5 and 6 from the petitioner. It is further contended that on 01.08.2013, the Government of A.P. released further extent of Ac.18.34 gts. in Sy.Nos.208 and 209 of Kondapur Village, to respondents 5 and 6.

7. The petitioner further submits thus a total extent of Ac.36.01 gts., of land was released by the Government of A.P. to the respondent No.s 5 and 6 in the said survey numbers; and he would be entitled to get 25% share therein.

8. According to him, as per the agreement dated 22.04.1998, petitioner and the respondent No.s 1 to 10 would be co-owners of the said extent of Acs.36.01 gts.; the said land was released by the efforts of the petitioner and respondents 1 to 4, who invested huge amounts and spent valuable time in attending different Courts by engaging efficient advocates and they had also visited the offices of the Revenue Department and that of the Urban Land Ceiling authorities.

9. He contended that when he demanded respondent Nos. 1, 5 and 6 for partition of the said extent of Ac.36.01 gts., and demanded his share of 25% therein, they kept on postponing the same on some pretext or the other without allotting his share to him; that they are not cooperating with him for partition of his share in the plaint schedule property as per the agreement dt.22.04.1998; respondent no.s 1,5 and 6 have colluded with each other and were trying to alienate the

property in favour of the third parties; that the respondent No.s 1, 5 and 6 had executed a Deed of conveyance and sale deed bearing No.514 of 2008 dt.07.07.2008 in favour of the M/s. Sumeru Infrastructure Park of which first respondent is the Managing Partner; that petitioner also came to know that Respondent No.1 entered into Memorandum of Understanding with Respondent No.s 5, 6, and 9; that respondent Nos. 11, 5, 6 and 9 executed a Development Agreement-cum-General Power of Attorney in favour of 12th respondent; that these documents do not bind him and it was the bounden duty of respondents 5 and 6 to execute registered sale deed in favour of the petitioner and respondents 1 to 4 as per the agreement dt.22.04.1998.

10. He asserted that by the date of the agreement the plaint schedule property was not in possession of enjoyment of respondents 5 and 6 and they got the same only because of the efforts of the petitioner and respondent Nos. 1 to 4; so the petitioner and respondent Nos.1 to 6 are co-owners and they are in *joint and constructive possession* of the plaint schedule property. Stating thus, he paid Court of Rs.200/- invoking Section 34(2) of A.P. Court Fee and Suit Valuation Act, 1956 (for short 'the Act') as regards relief of partition.

I.A. NO.1186 OF 2014 FILED BY RESPONDENT NO.1 TO REJECT THE PLAINT

11. Pending the suit, respondent No.1 filed application I.A. No.1186 of 2014 under Order VII Rule 11(b) and (c) of CPC to reject the plaint.

12. In the said application, he contended that by clever drafting of the plaint the petitioner had created the illusion of a cause of action for partition by camouflaging the relief of specific performance as a suit for partition in order to avoid payment of Court Fee for specific performance; that when the plaint as a whole is read along with the documents it is clear that he contrived to obtain relief of specific performance by styling and camouflaging the suit as one for partition; that the claim/ relief is undervalued; and that petitioner should have claimed relief of specific performance which is valued at $\frac{3}{4}$ th of the market value of immovable property which comes to Rs.49.03 Crores and paid Rs.49,06,446/- as court fee thereon.

13. It is further contended that the plaint schedule property belongs to the respondent No.s 5 and 6 and is not the petitioner's family property or property owned jointly or in common by the petitioner with other respondents, but the petitioner is claiming share out of the plaint schedule property in his capacity of an agreement holder in the agreement dt.22.04.1998 and the plaint should have been valued under Section 39 (e) of the Act and not under Section 34 (2) of the Act.

14. It is contended that the petitioner is seeking specific performance of the agreement dt.22.04.1998 by cleverly making innocuous statements here and there in the plaint that he is co-owner and in joint and constructive possession etc., of the plaint schedule property in order to create illusion to claim the relief of partition and he ought to have claimed relief of specific performance. It is also pointed out that

petitioner had no pre existing right, title or interest in the suit schedule property. It is denied that the petitioner or respondents 1 to 4 are co-owners of the suit schedule property.

15. It is also contended that for a suit of specific performance, period of limitation is prescribed under Article 54 of the Limitation Act, 1963, that the said limitation had already been expired, and by filing the suit for partition, the petitioner is attempting to achieve indirectly what he could not have achieved directly and this is barred by law.

16. Reference is also made to I.A. No.812 of 2013 to O.S. No.1029 of 2013 filed by the respondent No.3 against the petitioner and respondent nos. 1, 2, 4 to 11 in the present suit claiming his share in the plaint schedule property and it is contended that in the suit, the third respondent was directed to pay the Court Fee of Rs.9,83,206.63 for his claim of 5% out of 60% of the suit schedule property.

THE COUNTER AFFIDAVIT OF PETITIONER IN IA.NO.1186/2014

17. Counter affidavit was filed by the petitioner refuting the said contentions.

18. He stated that he had clearly mentioned about the cause of the action in the plaint, and the first respondent with an intention to delay the proceedings had filed the I.A. to reject the plaint.

19. He further contended that the suit filed by him against the respondent is for partition of the plaint schedule property to allot 25% share in the plaint schedule property; that it is well within the

limitation; that as per the para 4(a) of the Agreement dt.22.04.1998 the amounts received by respondents 6 to 10 were refundable *after completion of the contract* in full, and since it is not concluded, they should have returned the earnest money to the petitioner and others, but they did not do so. He contended that the period of limitation is to be decided at the time of trial and not at the stage of I.A.

20. He also contended that the 1st respondent did not even file his written statement in the suit and without doing so he filed the present I.A.

21. According to petitioner, the contention of 1st respondent that the petitioner should file suit for specific performance of the agreement dt.22.04.1998 but not suit for partition, should be decided at the time of trial and not in this application. He asserted that his legal advice is that such a suit for partition is maintainable.

22. He contended that since the 1st respondent also is co-sharer along with petitioner and others pursuant to the agreement dt.22.04.1998, it is not open to the 1st respondent to contend that there is no pre-existing, right, title or interest in the plaint schedule and it is for respondent No.s 5 and 6 to take such plea.

23. It is alleged that the petitioner, with *mala fide* intention and for wrongful gain to cause loss to the petitioner and other sharers, colluded with respondent Nos. 5 and 6 and obtained registered conveyance and sale deed from them on 07.07.2008.

24. He also contended that suit for partition is maintainable under law because by the date of the agreement dated 22.04.1998, property is not in possession of both the parties to the contract and was in the hands of the State. According to him, from the date of the said agreement, petitioner and his other co-sharers got pre existing right over the plaint schedule property and they are to be treated as co-owners thereof.

25. He pointed out that O.S. No.1029 of 2013 was filed by the third respondent for declaration of title and injunction while he (petitioner) had filed a suit for partition and paid the Court Fee also correctly and any order passed therein does not bind him.

THE EVENTS AFTER FILING THE I.A.No.1186 OF 2014

26. Initially on 22.02.2017, the trial Court allowed I.A. No.1186 of 2014 and directed the petitioner to pay the Court Fee of Rs.49,05,329/- under Section 39 (e) of the Act before 24.03.2017 failing which the plaint would stand rejected by taking a view that the petitioner wantonly sought relief of partition though he wanted to enforce agreement dt.22.04.1998 specifically with the sole intention of avoiding the Court Fee and it cannot be countenanced. It also rejected the contention of the petitioner that the parties are co-sharers/co-owners.

27. This was questioned in CRP. No.1985 of 2017 by the petitioner. This Court allowed the said Revision on 04.08.2017 and observed that

the trial Court could have only examined whether the relief in the plaint was undervalued, and if so, direct the proper valuation thereon under Clause (b), or if found to have been properly valued, examine whether the Court Fee paid thereon was sufficient, and if found to be otherwise, direct the payment of deficit Court Fee under Clause (c). It observed that the trial Court misdirected itself by going into the question as to what relief should have been asked by the petitioner in the suit and asking the petitioner to pay Court Fee under 39(e) of the Act. It held that when the prayer in the suit is still one for partition, trial Court cannot ask the petitioner to pay Court fee by treating it as a suit for specific performance. It therefore remanded the I.A. for consideration afresh by the trial Court and to deal with the same under Order VII Rule 11 (a) and (d) of CPC independently uninfluenced by any observations made in its order.

28. The 1st respondent questioned the same in the Supreme Court of India in Special Leave Appeal (C) No.35312 of 2017.

29. On 05.01.2018, at the stage of admission, without issuing notice to the petitioner, the said SLP was disposed of stating that if necessary, the trial Court may frame an issue whether the suit is actually one for specific performance or for partition and decide it.

ORDER DT.17-7-2018 PASSED AGAIN IN I.A.NO.1186 OF 2014 POST REMAND

30. Since the order of remand made in CRP No.1985 of 2017 on 04.08.2017 was not interfered with by the Supreme Court, the trial Court again passed the impugned order on 17.07.2018 directing the

petitioner to pay the Court Fee under Section 34(1) of the Act by 14.08.2018 and in default stated that the plaint would be rejected.

31. In this order, the trial Court held that even as on the date of agreement and also as per the contentions of the petitioner, he is very much aware that the owners of the property i.e respondent No.s 1 to 6 are not at all in possession and enjoyment over the said property; as per the admission made by the petitioner in the pleadings subsequently Government gave possession of the plaint schedule property to the respondent Nos. 5 and 6; and so it is the bounden duty of the petitioner to explain how he became the joint owner and possessor over the said property and more particularly, a co-owner. It observed that petitioner did not properly and satisfactorily explain to the Court how he became joint owner and possessor/co-owner of the property.

32. While observing that to decide the I.A. it has only to see that the plaint and documents filed by the petitioner along with the plaint Exs.R1 to R10, it held that even to the petitioner's knowledge, the respondents were not in possession and enjoyment of the schedule property when they entered into agreement dt.22.04.1998 (Ex.R1). It also observed that since the petitioner stated that there was registered sale deed executed by the respondent No.s 5 and 6 in favour of the first respondent Firm M/s. Sumeru Infrastructure Park, the petitioner cannot be said to be in joint and constructive possession; and so, the

Court Fee of Rs.200/- paid by him is not proper and he ought to pay Court Fee of Rs.49,06,446/-.

The present CRP

33. Assailing the same this Revision Petition is filed.

34. Heard Sri V.Srinivas for Sri P.Rajesh Babu, counsel for the petitioner and Sri R.A. Achuthanand, counsel for 1st respondent.

35. The counsel for petitioner endorsed in the Memorandum of Grounds of Revision that respondents 2 to 12 are not necessary parties to the Revision.

THE CONSIDERATION BY THE COURT

36. From the above narrated events, it is clear that petitioner had filed the above suit for partition of plaint schedule property claiming that he, along with respondent No.s 1 to 6 are joint owners/co-owners as per the agreement Ex.R1 dated 22.04.1998 of the plaint schedule property; that he is entitled to 25% of share therein; that though he demanded respondent No.s 1, 5 and 6 for partition and delivery of his separate share, they did not do so; and so he had to file the suit for partition.

37. In the plaint it is his contention that he and respondent No.s 1 to 4 helped respondents 5 to 10 to get back from the State lands of extent Ac.36.01 gts., which had been declared as a surplus under the Urban Land (Ceiling and Regulation) Act, 1976; and this was done pursuant

to the agreement Ex.R1 dt.22.04.1998 which was executed by respondents 5 to 10 with himself and respondents 1 to 4. His contention is that he is entitled to 25% share therein.

38. In the application I.A. No. 1186 of 2014 filed by the first respondent under Order 7 Rule 11 (b) and (c) of the Civil Procedure Code seeking rejection of the plaint, it is his contention that petitioner ought to have filed a suit for specific performance of the agreement dt.22.04.1998 and not a suit for partition; and by clever pleading, petitioner had filed the suit for partition by paying Rs.200/- Court Fee under Section 34(2) of the A.P. Court Fee and Suit Valuation Act, 1956 (for short “the Act”), instead of paying Court Fee of Rs.49,06,329/- payable under Section 39 (e) of the said Act which deals with payment of Court Fee for suits for specific performance.

39. However, in view of the order dt.05.01.2018 in Special Leave to Appeal (c) No.35312 of 2017 passed by the Supreme Court (arising out of the order dt.4.08.2017 in CRP.No.1985 of 2017), the question whether the petitioner should have filed a suit for specific performance or for partition is to be decided by the trial Court after framing an issue and therefore, I do not intend to deal with the said aspect.

40. I would only confine myself to the question :

“whether, assuming that the suit for partition is maintainable, the petitioner correctly paid Court Fee invoking Section 34(2) of the Act or not?”

41. The Supreme Court in **T. Arivandandam v. T.V. Satyapal**¹ held that if on a meaningful — not formal — reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, the Court should exercise its power under Order VII Rule 11 CPC taking care to see that the grounds mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, it should nip it in the bud at the first hearing by examining the party searchingly under Order X CPC.

42. It is also trite law that while deciding the issue about payment of Court fee, the court has to normally proceed on the plaint as framed and not on the plaint as it ought to have been framed and the Court shall begin with an assumption that the averments made in the plaint are correct. This is laid down in **Kamaleshwar Kishore Singh v. Paras Nath Singh**², in the following terms:

“8. It is well settled that the court fee has to be paid on the plaint as framed and not on the plaint as it ought to have been framed unless by astuteness employed in drafting the plaint the plaintiff has attempted at evading payment of court fee or unless there be a provision of law requiring the plaintiff to value the suit and pay the court fee in a manner other than the one adopted by the plaintiff. The court shall begin with an assumption, for the purpose of determining the court fees payable on plaint, that the averments made therein by the plaintiff are correct. Yet, an arbitrary valuation of the suit property having no basis at all for such valuation and made so as to evade payment of court fees and fixed for the purpose of conferring jurisdiction on some court which it does not have, or depriving the court of jurisdiction which it would otherwise have, can also be interfered with by the court. It is the substance of the

¹ (1977) 4 SCC 467

² (2002) 1 SCC 304

relief sought for and not the form which will be determinative of the valuation and payment of court fee. The defence taken in the written statement may not be relevant for the purpose of deciding the payment of court fee by the plaintiff. If the plaintiff is ultimately found to have omitted to seek an essential relief which he ought to have prayed for, and without which the relief sought for in the plaint as framed and filed cannot be allowed to him, the plaintiff shall have to suffer the dismissal of the suit.”

43. It is settled law that while considering the question of rejection of plaint, the averments in the plaint and the documents filed along with the plaint have to be looked into.

44. In **Saleem Bhai v. State of Maharashtra**³, the Supreme Court explained the manner of exercise of jurisdiction under Order VII Rule 11 CPC in the following terms :

“A perusal of Order 7 Rule 11 CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial court can exercise the power under Order 7 Rule 11 CPC at any stage of the suit — before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. For the purposes of deciding an application under clauses (a) and (d) of Rule 11 of Order 7 CPC, the averments in the plaint are germane; the pleas taken by the defendant in the written statement would be wholly irrelevant at that stage....”

45. This principle was reiterated by the Supreme Court in **Madanuri Sri Rama Chandra Murthy v. Syed Jalal**⁴ in the following terms:

“7. The plaint can be rejected under Order 7 Rule 11 if conditions enumerated in the said provision are fulfilled. It is needless to observe that the power under Order 7 Rule 11 CPC can be

³ (2003) 1 SCC 557

⁴ (2017) 13 SCC 174

exercised by the Court at any stage of the suit. The relevant facts which need to be looked into for deciding the application are the averments of the plaint only. If on an entire and meaningful reading of the plaint, it is found that the suit is manifestly vexatious and meritless in the sense of not disclosing any right to sue, the court should exercise power under Order 7 Rule 11 CPC. Since the power conferred on the Court to terminate civil action at the threshold is drastic, the conditions enumerated under Order 7 Rule 11 CPC to the exercise of power of rejection of plaint have to be strictly adhered to. The averments of the plaint have to be read as a whole to find out whether the averments disclose a cause of action or whether the suit is barred by any law. It is needless to observe that the question as to whether the suit is barred by any law, would always depend upon the facts and circumstances of each case. The averments in the written statement as well as the contentions of the defendant are wholly immaterial while considering the prayer of the defendant for rejection of the plaint. Even when the allegations made in the plaint are taken to be correct as a whole on their face value, if they show that the suit is barred by any law, or do not disclose cause of action, the application for rejection of plaint can be entertained and the power under Order 7 Rule 11 CPC can be exercised. If clever drafting of the plaint has created the illusion of a cause of action, the court will nip it in the bud at the earliest so that bogus litigation will end at the earlier stage.”

46. Keeping these principles in mind, I shall consider the contentions of the parties.

47. Before I do so, it is important to note the provisions of Section 34 of the A.P. Court Fee and Suit Valuation Act, 1956. The said provision states as under:

“Partition Suits:- (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the movable property or three-fourths of the market value of the immovable property, included in the plaintiff's share.

(2) *In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates:-*

When the plaint is presented to-

<i>(i) a District Munsiff's Court</i>	<i>Rupees fifty</i>
<i>(ii) a Subordinate Judge's Court or a District Court</i>	<i>Rupees one hundred if the value of plaintiff's share is less than Rs.10,000. Rupees two hundred if the value is not less than Rs.10,000."</i>

48. In the decision in **Md.Saleha v.Md.Yunus**⁵ cited by counsel for the respondent no.1 / defendant no.1, the Court held that once plaintiff proves that he is in joint possession or is a co-owner, Court fee is payable under Sec.34(2) of the Act.

49. In **Smt. Veena Challa vs. A. Panduranga Reddy and another**⁶, cited by counsel for 1st respondent, it was held that on a reading of the plaint if it is clear that the plaintiff had been excluded from the possession of the suit schedule property, court fee is payable under Section 34(1) of the Act. Similar view was taken in **Prathibha and another vs. Vedvathi and another**⁷.

50. The Supreme Court in **Neelavathi and Others Vs. N.Natarajan and Others**⁸ considered Section 37 of the Tamil Nadu Court Fee and Suit Valuation Act, 1955, which is in *pari materia* with Section 34 of the Act, and held that the plea in the plaint in a suit for a partition that the defendants and the plaintiff are in joint possession has to be given weight; and that even if the plaintiff alleged that the defendants did

⁵ (1994) 1 ALT 365 (DB)

⁶ AIR 2012 AP 47

⁷ 2007 (5) ALD 565

⁸ 1980(2) SCC 247

not give him his share, it cannot be said that the plaintiff is not in joint possession. It explained that mere fact that the plaintiff was not paid his share of the income or was not in actual physical possession, would not amount to the plaintiff having been *excluded* from joint possession. It explained that Court Fee is payable under Section 37(1) of the said Act, only if the plaintiff is *excluded* from possession of the property; and before coming to the said conclusion, there has to be a clear and specific averment in the plaint that the plaintiff had been *excluded* from joint possession to which he is entitled under law.

51. It observed :

“Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to partition suits. Section 37 provides as follows:

“37. (1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff’s share.

(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed.”

It will be seen that the court fee is payable under Section 37(1) if the plaintiff is “excluded” from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided “joint family property” though not in the strict sense of the term. The general principle of law is that in

the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed, the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be called upon to pay court fee under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been “excluded” from joint possession to which they are entitled in law. The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession.”

(emphasis supplied)

52. Again in **Jagannath Amin v. Seetharama (dead) by LRs and others**⁹ this was reiterated while interpreting Sec.35 of the Karnataka Court Fees and Suits Valuation Act, 1958, which is also in *pari materia* with Sec.34 of the A.P statute. The Supreme Court reversed the view of the High Court which affirmed the view of the trial court that Court fee ought to be paid by plaintiff under Sec.35 (1) and not under Sec.35(2) of the said Act . It held that *since the plaintiff pleaded she was a co-owner, she has to be presumed to be in constructive possession of the property.* It upheld the view expressed by the Karnataka High Court in **T.K.Srinivasa Murthy v.**

⁹ 2007 (1) SCC 694

T.Seetharamaiah¹⁰ that to apply Sec.35(1), there must be a clear and specific averment in the plaint that plaintiff has been excluded from the joint possession; and *an averment that plaintiff could not remain in joint possession would not amount to exclusion from possession.*

53. Keeping in mind these decisions I shall consider the pleadings in the plaint and the documents filed with the plaint to the extent they are relevant.

54. In the plaint the following pleadings are taken:

Para 10: *“as per the order of the Hon’ble Supreme Court of India, the defendant nos.5 and 6 got an extent of Acs.8.58 cents of land each of the defendants and both are entitled of an extent of Acs.17.16 cents in Survey Nos.208 and 209 of Kondapur Village; that the Urban Ceiling Authority has given physical possession of the land to Defendant nos.5 and 6 on 06.02.2008 and the same fact was suppressed by defendant nos.1, 5 and 6;*

Para 11: *“...that again on 01.08.2013, the Government of Andhra Pradesh released balance remaining area of Acs.18.34 guntas to defendant nos.5 and 6 in Survey Nos.208 and 209 of Kondapur Village, Serilingampally Mandal of Ranga Reddy District; that the State of Andhra Pradesh adopted the Urban land (Ceiling and Regulation) Repeal Act, 1999 with effect from 27.03.2008 and the remaining balance of Acs.18.34 guntas released by the Andhra Pradesh Government and the same was handed over to defendant nos.5 and 6 in the month of August, 2013, and thus, the total extent of Acs.36.01 guntas of land released by the Government of Andhra Pradesh in Survey Nos.208 and 209 of Kondapur Village to defendant nos.5 and 6;*

Para 13 : *“...that in pursuance of the agreement of contract dt.22.04.1998, the plaintiff and defendant nos.1 to 10 are the co-owners pertaining to the land of an extent of Acs.95.24 guntas whereas the Government has accepted the declarations of defendant nos.5 and 6 and released their part of land, i.e., Acs.36.01 guntas;*

¹⁰ AIR 1990 Kant 149

and that the plaintiff and defendant nos.1 to 6 accordingly are co-owners of the plaint schedule property pertaining to their shares mentioned in the Agreement of Contract;

Para 15: that the plaintiff demanded defendant nos.1, 5 and 6 and to partition Acs.36.01 guntas of land and demarcate his share of 25% in Acs.36.01 guntas of land but defendant nos.5 and 6 and 1st defendant have been postponing the same on some pretext or the other without allotting the share of plaintiff in the plaint schedule property;

Para 16: "... that since defendant nos.1 to 6 are not co-operating with the plaintiff for partition of his share in the plaint schedule property as per the Agreement of Contract dt.22.04.1998, and that it is not safe to keep the property covered in the Agreement of Contract as joint since defendant nos.1 to 6 had colluded among themselves and were trying to alienate the property in favour of third-parties which they are not entitled to."

Para 19 : "The plaintiff further contended that the Government of Andhra Pradesh released the remaining extent of Acs.18.34 guntas on 01.08.2013 to defendant nos.5 and 6; that defendant nos.5 and 6 and 1st defendant colluded together and are trying to transfer the land in favour of third-parties by suppressing the shares of plaintiff and defendant nos.2 to 4;

Para 21 : "that recently he came to know that 1st defendant entered into Memorandum of Understanding in the capacity of Managing Partner of M/s.Sumeru Infrastructure Park with defendant nos.5, 6 and 9;

Para 22: " that plaintiff came to know that defendant nos.11, 5, 6 and 9 executed a development agreement cum G.P.A. in favour of 12th defendant; that in fact, defendant nos.11, 5, 6 and 9 had no right over the plaint schedule property, and plaintiff and defendant nos.1 to 6 alone got right over the plaint schedule property as per their shares mentioned in the agreement of contract dt.22.04.1998, and that if any document executed by defendant nos.5 and 6 in favour of third-parties would not be binding upon plaintiff and defendant nos.1 to 4;

Para 23: " that the 11th defendant-Firm is represented by brother of 1st defendant in the capacity of Managing Partner with regard to Development Agreement-cum-G.P.A. executed by defendant nos.11, 5, 6 and 9 in favour of 12th

defendant for some extent of land out of the plaint schedule property in which the 12th defendant is constructing villas, and the same would not bind the plaintiff and defendant nos.1 to 4.”

Para 32: “The plaintiff submits that by the date of agreement of contract, the plaint schedule property was not in the possession and enjoyment of defendant nos.5 and 6 and that with the efforts of petitioner and defendant nos.1 to 4, the defendant nos.5 and 6 got the property; and that the plaintiff and defendant nos.1 to 6 are the co-owners pertaining to the plaint schedule property;

Para 33: “ ... that plaintiff and defendant nos.1 to 6 were in joint and constructive possession of the plaint schedule property; that defendant nos.1, 5, 6 and 11 were trying to transfer the part of the plaint schedule property particularly of an extent of Acs.18.34 guntas of land in favour of third parties by fabricating the documents;”

Para VII. “ ... that plaintiff and defendant nos.1 to 6 are joint and constructive possession of the plaint schedule property, hence the Court Fee of Rs.200/- was paid under Section 34(2) of A.C.F. & S.V. Act; that the relief of injunction is valued at Rs.50,000/- on which a Court Fee of Rs.2,386/- was paid under Section 26(c) of the A.C.F. and Suits Valuation Act, read with Article I Schedule I of A.C.F. and S.V. Act; that Rs.200/- was paid under Section 34(2) and Rs.2,386/- was paid under Section 26(c) of the A.C.F. and Suits Valuation Act read with Article I Schedule I of A.C.F. and S.V. Act; and that the total Court Fee payable was Rs.2,586/-.”

55. Counsel for petitioner/plaintiff contended that at the time the suit agreement was entered into between the parties on 22-4-1998, the possession of the properties was not with any of the defendants and that much later on 6-2-2008 and 1-8-2013, Ac.17-16gts & Ac.18.34 gts in S.No.208 and 209 of Kondapur Village was delivered to Respondents 5 and 6 by the State Government; and as per the terms of the agreement, in particular clauses 3,6 and 9, the parties to the agreement became co-owners of the said property.

56. Counsel for the 1st respondent/Defendant no.1 refuted the said contentions and contended that the parties had no pre-existing right in the property and so cannot be termed as co-owners at all. He also contended that when the property was released by the Government only to defendant nos.5 and 6, plaintiff / petitioner cannot say that he is in joint possession along with the defendants.

57. To consider this contention, I shall refer to the relevant clauses in the Agreement dt.22.04.1998.

(i) Clause 1 of the agreement dt.22-4-1998 states:

“ The parties of the second part at their own expense and efforts will follow up with all the concerned authorities and the courts with regard to clearance of atleast 16 acres of land out of the said land.”

(ii) Clause 3 states:

“Out of the said property 40% of it will be to the share of the parties of the first part and the balance 60% of the said property will be to the share of the parties of the second part in lieu of as (1) above.”

(iii) Clause 6 states :

“All expenses and risks involved in getting clearance for the said property for alienation is to the cost of the parties of the second part and the parties of the second part in case of failure cannot claim either any expenses or compensation for the time and effort put in from the parties of the first part.”

(iv) Clause 9 states :

“The said 60% of said property is to be shared among the parties of the second part as 20, 20, 7.5, 7.5 and 5, respectively.”

58. In my opinion, *prima facie*, the above clauses suggest that if the petitioner and respondents 1 to 4 helped respondents 5 to 10 to get back from the State *any* land which had been declared as a surplus under the Urban Land (Ceiling and Regulation) Act, 1976, they would have the above shares in it.

59. Thus from the moment *any* land comes back to respondents 5 and 6, the character of *jointness* would attach to it *prima facie*, and it would be joint property and they would be co-owners.

60. It was held in **Ramanlal Bhailal Patel v. State of Gujarat**¹¹, that when several persons acquire undivided shares in a property, they become co-owners. The Court declared :

“27. When several persons acquire undivided shares (as contrasted from defined portions) in a property, either equal or unequal, they become co-owners of the property; or where an owner of a property transfers a share in the property to another, the transferee becomes a co-owner along with the original owner. To be termed as co-owners, the right of each owner should be coordinate with the other “owners”. If the right of one is higher in degree than that of the other, there is no co-ownership. For example, a mortgagor and mortgagee are not co-owners. A lessor and lessee are not co-owners. Whether the shares are equal or not, each co-owner is entitled to be in possession of every part of the property, jointly with the other co-owners.”

61. The above principle would be attracted and from the moment *any* land comes back to respondents 5 and 6, the character of *jointness* would attach to it *prima facie*, and it would be joint property and they would be co-owners.

¹¹ (2008) 5 SCC 449

62. In my view, to create the relationship as co-owners, it is not necessary that there should be a pre-existing right in the property. For instance, if a Hindu male or female having self acquired property dies, their legal heirs as per the Hindu Succession Act, 1956 would be co-sharers though they do not have a pre-existing right in the such property (See **Shanmugasundaram** (17 infra)). Such relationship of co-ownership can also be created by agreement like in the instant case.

63. The concept of co-ownership was explained in **Sri Ram Pasricha v. Jagannath**¹², where it was stated that jurisprudentially it is not correct to say that a co-owner of a property is not its owner. He owns every part of the composite property along with others and it cannot be said that he is only a part-owner or a fractional owner of the property. The position will change only when partition takes place.

64. In **Mohd.Baqar v. Naimunnissa Bibi**¹³, it was held that possession of a co-sharer is the possession of all co-sharers. It was declared:

“The parties to the action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period.”

65. This was reiterated in **Tanushree Basu v. Ishani Prasad Basu**.¹⁴

¹² (1976) 4 SCC 184

¹³ AIR 1956 SC 548

¹⁴ (2008) 4 SCC 791.

66. The counsel for respondent no.1 then contended that petitioner himself pleaded that some of the plaint schedule property has been alienated by respondent no.1, 5 and 6 and even referred to registered documents executed in that regard, and this shows that petitioner is not in joint possession of at least some of the plaint schedule property.

67. It is important to note that the petitioner did not plead that he was *excluded* from possession but his specific plea in the plaint is that he is in joint possession of the plaint schedule property.

68. The plea of the 1st respondent presupposes that a plaintiff in a suit for partition claiming to be in joint possession must prove actual physical possession, but this is not the law. As observed in **Neelavathi** (8 supra), in the case of co-owners, to continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. As held in **Jagannath Amin** (9 supra) an averment that plaintiff could not remain in joint possession would not amount to exclusion from possession.

69. Also, it is for the 1st respondent to plead and establish ouster of the petitioner, once the petitioner *prima facie* establishes that he is a co-owner. In **Vidya Devi v. Prem Prakash**¹⁵, at page 505 :

“27. in order that the possession of co-owner may be adverse to others, it is necessary that there should be ouster or something equivalent to it.

28. ‘Ouster’ does not mean actual driving out of the co-sharer from the property. It will, however, not be complete unless it is

¹⁵ (1995) 4 SCC 496

coupled with all other ingredients required to constitute adverse possession. Broadly speaking, three elements are necessary for establishing the plea of ouster in the case of co-owner. They are (i) declaration of hostile animus, (ii) long and uninterrupted possession of the person pleading ouster, and (iii) exercise of right of exclusive ownership openly and to the knowledge of other co-owner. Thus, a co-owner, can under law, claim title by adverse possession against another co-owner who can, of course, file appropriate suit including suit for joint possession within time prescribed by law.”

70. This decision was followed in **Nagabushanammal vs. C. Chandikeswaralingam**¹⁶.

71. Moreover, it was held in **Shanmughasundaram v. Diravia Nadar**¹⁷, that as between co-owners such as brothers and sisters who have jointly *inherited* property, neither the concept of coparcenery nor agency would be attracted; and in the absence of partition among them, some of them cannot sell the property and at best they can sell only their undivided shares and the purchasers would have to sue for partition. The Court stated:

“Admittedly, the property has been jointly inherited by two brothers and three sisters. As heirs under the Hindu Succession Act, they inherited the property as co-owners. In the absence of partition between them, the two brothers together had undivided share in the property and they could not have agreed for sale of the entire property. They were competent to execute agreement to the extent only of their undivided share in the property. In the event of sale of such undivided share, the vendee would be required to file a suit for partition to work out his right in the property. The left-out three sisters as co-owners having undivided share in the whole property, the two brothers are incompetent to abide by the award.”

¹⁶ (2016) 4 S.C.C. 434

¹⁷ (2005) 10 SCC 728

72. A further corollary of this is that an alienee, who purchased property from another co-sharer, can work out the equity in his favor in the final decree proceedings in a suit for partition. This well settled principle is laid down in **T.G. Ashok Kumar v. Govindammal**¹⁸ it was held that where a co-owner alienates a property or a portion of a property representing to be the absolute owner, equities can no doubt be adjusted while making the division during the final decree proceedings, if feasible and practical (that is, without causing loss or hardship or inconvenience to other parties) by allotting the property or portion of the property transferred *pendente lite*, to the share of the transferor, so that the bona fide transferee's right and title are saved fully or partially.

73. This was reiterated in **T. Ravi v. B. Chinna Narasimha**¹⁹, where the Court declared:

“It is well-recognised principle of law relating to co-owners or tenants-in-common that an alienation by a co-owner or a tenant-in-common of a share in any item of the property is subject to the rights and equities of the other co-owners or tenants-in-common. It has also been observed on the basis of Cooper v. Fisher²⁰ that if persons deal in such interests as undivided shares, they do so with the liability of having something assigned to them different from what they might originally possess. The alienee of part of an undivided estate must take his interest subject to a bill of partition being filed against him.”

¹⁸ (2010) 14 SCC 370

¹⁹ (2017) 7 SCC 342

²⁰ (1841) 10 LJ Ch 221

74. The Court below erred in holding that the petitioner did not properly and satisfactorily explain how he becomes joint owner and possessor over the suit schedule property and more particularly as co-owner because in para-12 of the plaint after mentioning that defendant Nos.5 and 6 got Ac.36.01 gts of land and that he had got 25% share therein, in para-13, it is stated that petitioner and respondent Nos.1 to 10 are co-owners of the said land. This was also reiterated in para-32 and 33 of the plaint. The said pleadings of the petitioner should have been understood by the trial Court in the light of the well settled legal position set out above, but unfortunately it did not do so.

75. On the contrary, instead of proceeding to decide the question of Court fee by accepting the plaint allegations as true (as held in **Kamaleshwar Kishore Singh** (2 supra)), in para-22, it doubted the correctness of the pleading of the petitioner that he is in joint and constructive possession of the plaint schedule property, and even observed that petitioner “is not in joint and constructive possession over the schedule property as urged by him”, which it is not entitled to do.

76. I also disagree with the view expressed by the trial Court that petitioner wantonly moulded the pleadings as per his convenience and paid only Rs.200/- towards Court fee and he ought to have paid Court fee of Rs.49,06,446/-.

77. Accordingly, the Civil Revision Petition is allowed; order dt.17-07-2018 in I.A.No.1186 of 2014 in O.S.No.825 of 2014 is set aside; and the said I.A. is dismissed with costs of Rs.5,000/- (Rupees Five Thousand only) to be paid by 1st respondent to the petitioner within three (03) weeks from the date of receipt of copy of the order.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 19-03-2019

Lsk/Vsv

