

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Civil Revision Petition No.6543 of 2018

ORDER :

This Revision is filed challenging the order dt.30.07.2018 passed in I.A.No.192 of 2016 in O.S.No.70 of 2014 on the file of V Additional District Judge, Bhongir.

2. The petitioners herein are defendant nos.1 and 2 in the above suit.

3. The respondent nos.1 and 2 are the sisters of petitioners.

4. They filed the said suit against petitioners alleging that 3rd respondent / 3rd defendant had earlier filed O.S.No.315 of 2000 before the Principal Junior Civil Judge, Bhongir for partition of 'A' to 'I' Schedule properties arraying respondent nos.1 and 2 as defendant nos.6 and 7, and in that suit a written statement was got filed stating that respondent nos.1 and 2 had given up their rights over the plaint schedule property and a decree was obtained dividing the plaint schedule properties into six shares.

5. It is contended that respondent nos.1 and 2 never engaged any Advocate and they did not file any written statement and they came to know about the division of properties pursuant to the preliminary decree in O.S.No.315 of 2000. They contended that one other item of the property was left out in the earlier suit O.S.No.315 of 2000 and the judgment and decree dt.26.08.2013 passed therein was obtained by

petitioners and 3rd respondent by playing fraud on the Court. They also pleaded that they did not receive any suit summons or notices in O.S.No.315 of 2000. They, therefore, sought a declaration that the judgment and decree passed therein on 26.08.2003 was obtained by playing fraud on the Court; and to pass a preliminary decree that they are entitled to 1/8th share in 'A' to 'J' Schedule properties along with petitioners and other defendants.

6. Written statement was filed by petitioners denying the allegations leveled in the plaint and contending that they had filed a Written Statement in O.S.No.315 of 2000 in April, 2003 through an Advocate by name Shri N. Malleshwar, stating that they were not claiming any right or share in the suit schedule property, and so there is no fraud committed by them. It was also denied that 'J' Schedule property was the property left by the father of respondent nos.1 and 2.

7. The petitioners then filed I.A.No.192 of 2016 before the V Additional District Judge, Bhongir invoking Order VII Rule 11 (d) of Civil Procedure Code, 1908 read with Section 11 thereof and sought rejection of the plaint.

8. In the affidavit filed in support of the said application, they reiterated the contents of written statement and stated that the judgment and decree dt.26.08.2003 passed in O.S.No.315 of 2000 is valid and the said judgment operates as *res judicata* and bars the suit O.S.No.70 of 2014 filed by respondent nos.1 and 2. It was contended

that there was an appeal A.S.No.24 of 203 filed before the Senior Civil Judge Court, Bhongir against the judgment in O.S.No.315 of 2000 wherein notices were served on 2nd respondent on 03.12.2003, and so they cannot plead ignorance of the same. It is contended that if the proceedings are proceeded with in the suit, it would result in wastage of precious time of the Court since the rights of parties have already been decided by the Junior Civil Judge, Bhongir in O.S.No.315 of 2000; and therefore the plaint be rejected.

9. Counter-affidavit was filed by respondent nos.1 and 2 opposing this application, and reiterating the contents in the plaint. They stated that since petitioners were afraid that the truth about the fraud played by them would come out, they filed the present I.A. They stated that the principle of *res judicata* would not be applicable and would not bar the suit.

10. By order dt.30.07.2018, the Court below dismissed the said application. It referred to Order VII Rule 11 of Civil Procedure Code, 1908 and stated that rejection of plaint can only be done by a Court if a case falls within Clauses (a) to (g) mentioned therein. It pointed out that the relief claimed in O.S.No.315 of 2000 and O.S.No.70 of 2014 are different, and cause of action is also different; and the application filed by petitioners did not satisfy any of the grounds mentioned in Order VII Rule 11 of Civil Procedure Code, 1908.

11. Assailing the same, the present Civil Revision Petition is filed.

12. The counsel for petitioners reiterated the contentions in I.A.No.192 of 2016 and stated that in view of the judgment rendered in O.S.No.315 of 2000, the present suit is barred by the principle of *res judicata*, and so this suit is to be dismissed on the said ground.

13. The counsel for respondents relied on the decisions in **Kamala and others v. K.T. Eshwara SA and others**¹ and **Soumitra Kumar Sen vs. Shyamal Kumar Sen and others**², and stated that rejection of plaint on the grounds of *res judicata*, which requires consideration of pleadings in the written statement, cannot be done.

14. I have noted the contentions of both sides.

15. In **Kamala** (1 supra), the Supreme Court considered Order VII Rule 11 (d) of Civil Procedure Code, 1908 and stated that as per the said provision the suit should be barred under any law, and such a conclusion must be drawn from the averments made in the plaint. It observed that different clauses in Order VII Rule 11 should not be mixed up, and in a given case application for rejection of the plaint may be filed on more than one ground specified therein. It was also observed that only the averments in the plaint should be taken into account while invoking Clause (d) of Order VII Rule 11 of Civil Procedure Code, 1908, and there cannot be any addition or subtraction thereto. It observed that no amount of evidence can be looked into and the issues on the merit of the matter which may arise between the

¹ (2008) 12 S.C.C. 661

² (2018) 5 S.C.C. 644

parties would not be within the realm of the Court at that stage. While noting that the principles of *res judicata*, when attracted, would bar another suit in view of Section 12 of the Code, the Supreme Court held that question involving mixed question of law and fact which may require not only examination of the plaint, but also other evidence, and the order passed in the earlier suit, may be taken up either as a preliminary issue or at the final hearing, but the said question cannot be determined at that stage. It observed that it is one thing to say that the averments made in the plaint on their face disclose no cause of action, and it is another thing to say that although the same discloses a cause of action, the same is barred by law. The Court reiterated that while considering an application under Order VII Rule 11 the Court would not consider any evidence or enter into a disputed question of fact or law. The Court also observed that identity of properties which are subject matter of the earlier suit vis-à-vis the properties which were subsequently acquired and the effect thereof is beyond the purview of Order VII Rule 11 (d) of Civil Procedure Code, 1908; and also the question whether the properties mentioned in the plaint are available for partition, which is essentially a question of fact, cannot be gone into.

16. In **Soumitra Kumar Sen** (2 supra), the Supreme Court held that a defence projected in the written statement cannot be looked into while deciding application under Order VII Rule 11 of Civil Procedure Code, 1908. In that case, the Court upheld the action of the

High Court which refused to reject a plaint on the ground that the suit is barred by the principle of *res judicata*.

17. In view of the above decisions rendered by the apex Court that plaints cannot be rejected on the ground of *res judicata* which require consideration of pleadings and written statement, I do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court with the impugned order.

18. Also, it is important to note that 'J' Schedule property which is subject matter of O.S.No.70 of 2014 is not the subject matter of O.S.No.315 of 2000. Whether the said property is also joint family property or not, in any event, was not the subject matter of O.S.No.315 of 2000.

19. Therefore, I do not find any merit in the Civil Revision Petition, and it is accordingly dismissed. No order as to costs.

20. As a sequel, miscellaneous petitions pending if any in this Civil Revision Petition, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 19.03.2019

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