(2016) 08 AP CK 0034

Andhra Pradesh High Court

Case No: A.S. No. 682 of 2015.

Mustigulla @ Namaswamy Hemanth Kumar - Appellant @HASH M/s. Abhaya Infrastructures Private Limited and 89 Others	APPELLANT
Vs	
	RESPONDENT

Date of Decision: Aug. 11, 2016

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, Section 96

Citation: (2017) 170 AIC 728 : (2016) 6 ALT 244 : (2016) 6 AndhLD 598 : (2017) 1 CivilLJ 764 : (2017) 2 HLT 1 : (2017) 1 ICC 503

Hon'ble Judges: Sri. V. Ramasubramanian and Anis, JJ.

Bench: Division Bench

Advocate: Sri M.V. Durga Prasad, Advocate, for the Petitioners; Sri. P. Veera Reddy, Advocate, for the Respondents Nos. 1 to 3; Sri. M.V.S. Suresh Kumar, Advocate, for the Respondent Nos. 4 to 6; Mr. Pashadapu Subba Roa, Advocate, for the Respondent No. 11; Mr. V.

Final Decision: Allowed

Judgement

V. Ramasubramanian, J. - This regular appeal filed under Section 96 of the Code of Civil Procedure, arises out of a judgment passed by the trial Court rejecting a plaint under Order 7, Rule 11 of the Code.

2. Heard Sri M.V. Durga Prasad, learned counsel for the appellant, Sri P. Veera Reddy, learned senior counsel for respondents 1 to 3 and Sri M.V.S. Suresh Kumar, learned counsel for the respondents 4 to 6. The respondents 7 to 10 herein, who were also the applicants along with the respondents 1 to 6 herein in the application for rejection of plaint filed before the trial Court, have been served with summons. But they have not chosen to enter appearance. The respondents 11 to 17, 20, 23, 24,

26 to 28, 31, 34 to 41, 46 to 58, 60 to 65, 67, 69, 70, 74, 75, 77, 78, 80 to 82, 84, 86, 88 & 89 have all been served with summons. Some of them have entered appearance through counsel, but others have chosen to remain unrepresented. But for the purpose of disposal of this appeal, the presence of respondents 1 to 10 is what is material, since it is their application for rejection of plaint, which was allowed by the trial Court, forcing the plaintiff to come up with the present appeal. Therefore, we have taken up the appeal for disposal.

3. The appellant herein filed a suit in O.S.No.748 of 2014 on the file of Principal District Judge, Ranga Reddy District, praying for: (1) partition and separate possession of his 1/7th share in the suit schedule property; (2) a declaration that the judgment and decree in O.S.No.101 of 1969 dated 28-11-1969 on the file of Principal Junior Civil Judge, Rangareddy District was obtained fraudulently by Shanigala Narsaiah and Yellaiah; (3) a declaration that the Sale deeds and Gift deeds of defendants 4 to 11 were null and void; (4) a perpetual injunction restraining the defendants 1 to 11 from raising any further structures; (5) a direction to the defendants 46 to 55, i.e. revenue authorities, HMDA & GHMC etc., to demolish the existing structures; and (6) a direction to defendants 59 to 70 to stop financial aid to defendants 1 to 7.

4. The claim of the appellant/plaintiff in the suit was that the agricultural lands of the total extent of about Ac.36.18 guntas comprised in various survey numbers in Nizampet village, Qutubullapur Mandal, belonged to his great grand father by name Mustigulla @ Namaswamy Narsimhulu, even prior to independence; that Namaswamy Narsimhulu died, leaving behind him surviving, 4 sons by name Ramaiah, Lakshmaiah, Buchaiah and Yellaiah out of whom Lakshmaiah and Yellaiah died issue-less; that Ramaiah had a son by name Namaswamy Narsimhulu (who was the 17th defendant in the suit) and a daughter by name Lachamma, who died; that Narsimhulu had one son and 2 daughters, whose legal heirs were defendants 18 to 23; that Buchaiah died in 1970 leaving behind him 3 daughters and 2 sons, out of whom one son and 2 daughters died; that one those sons of Buchaiah by name Namaswamy Narsinga Rao was the 12th defendant; that Narsinga Rao has 3 sons, one of whom is the plaintiff and the other two are defendants 14 and 15; that the properties in Survey Nos.157 and 173 of Nizampet village, Qutubullapur Mandal measuring a total extent of Ac.1.31 guntas stood in the name of the original pattedar (Namaswamy Narsimhulu) and his elder son Ramaiah from 1954 till 1970; that the plaintiff gained knowledge about the existence of the ancestral property through his maternal grand parents in August, 2013 and immediately he took steps to gather particulars and also issued notices and representations to various parties; that 2 persons by name Shanigala Narsaiah and Yellaiah, who were cultivating the properties, filed a suit in O.S.No.101 of 1969 and obtained a decree fraudulently; that the plaintiff himself filed 5 petitions in I.A. (SR)Nos.5059 to 5064 of 2013 for reopening of the suit O.S.No.101 of 1969; that the 17th defendant who is none other than the eldest surviving male member of the branch emanating from Ramaiah also

filed a suit in O.S.No.40 of 2011 for setting aside the decree in O.S. No.101 of 1969, that the said suit was dismissed; that the plaintiff had already filed a separate application under Order 2, Rule 2 , for the purpose of proceeding against the other lands and that therefore the suit had to be decreed.

5. After service of summons in the suit, the defendants 1 to 6 and 8 to 11 jointly filed an application in I.A. No.600 of 2014 for the rejection of the plaint. The rejection of the plaint was sought on the ground inter alia, that the plaint averments did not disclose a cause of action; that there was no material or document to show that the suit property originally stood in the name of the great grand father Namaswamy Narsimhulu; that the suit has been filed for extracting money from defendants 1 to 3 who have taken up the construction of a huge number of residential apartments in the suit property; that the suit was not properly valued and sufficiently stamped; that the suit was barred by law under Section 11 of the Code; and that the suit was barred by time in view of Article 110 of the Schedule to the Limitation Act, 1969.

6. By a judgment and decree dated 17-10-2014, the Court below allowed the application for rejection of the plaint. It is seen from the order of the Court below that contains 9 paragraphs that the first 3 paragraphs related to the pleadings. The 4th paragraph related to the attempt of the respondent herein to give up some of the defendants in the application for rejection of plaint. The 5th paragraph speaks about the counter filed by some of the parties. The 6th paragraph speaks about the documents filed on either side. The 7th paragraph contains the point arising for determination and the 8th paragraph contains the entire discussion.

7. Paragraph 8 of the judgment of the Court below would show that the Court below chose to reject the plaint primarily for 3 reasons viz., (a) that the plaintiff was abrogating and subrogating and that there was no document to show Ramaiah to be the pattedar of the suit schedule land; (b) that the present suit was filed after an unsuccessful attempt by the 17th defendant to set at naught, the decree in O.S.No.101 of 1969; and (c) that the decree in O.S.No.101 of 1969 operated as res judicata. Aggrieved by such rejection of plaint, the plaintiff has come up with the above appeal.

8. The only point that arises for our consideration in the present appeal is as to whether the trial Court was right in rejecting the plaint or not?

9. It is needless to point out that a plaint can be rejected only on any one of the parameters contained in clauses (a) to (f) of Rule 11 Order 7 of the Code. In brief, these parameters are:

(1) where the plaint does not disclose the cause of action;

(2) where the relief is undervalued and the plaintiff fails to correct the valuation even after being required by the Court to do it;

(3) where the relief claimed in the plaint is properly valued, but it is insufficiently stamped and the plaintiff fails to cure the defect despite an opportunity;

(4) where the suit appears to be barred by any law;

(5) where the plaint is not filed in duplicate; and

(6) where the plaintiff has not complied with the provisions of the Rule 9 etc.

10. One of the earliest cases, which highlighted the importance of invoking the provisions of Order 7, Rule 11 to throw frivolous suits out of Court, was **T. Arivandandam v. T.V. Satyapal and another, (1997) 4 SCC 467** . This decision emphasised the need for trial judge to call the bluff, if by clever drafting, an illusion of a cause of action is created.

11. But for the exercise of the power conferred by Order 7, Rule 11 , the averments in the plaint and the documents filed along with the plaint alone are to be looked into. The Court cannot at that stage look into the written statement or the documents filed along with the written statement. These principles are well settled in **Raptakos Brett and Co. Ltd. v. Ganesh Property, (1998) 7 SCC 184** and **Mayar (H.K.) Ltd. v. Vessel M.V. Fortune Express, (2006) 3 SCC 100.**

12. As pointed out by Supreme Court in **Sopan Sukhdeo Sable and others v. Assistant Charity Commissioner and others, (2004) 3 SCC 137** the trial Court, while dealing with an application under Order 7, Rule 11 , must remember that if on a meaningful and not formal reading of the plaint, the claim is manifestly vexatious and meritless, in the sense of not disclosing a clear right to sue, the trial Court could invoke Order 7, Rule 11 (a).

13. Even though clause (d) of Rule 11 Order 7 enables a Court to reject a plaint, which appears to be barred by any law, the bar arising out of limitation, may not always enable the Court to throw the plaint out. Disputed questions relating to the bar of limitation cannot be gone into at the stage of deciding an application under Order 7, Rule 11 as held by the Supreme Court in **Popat and Kotecha Property v. State Bank of India Staff Association, (2005) 7 SCC 510**

14. As pointed out by the Supreme Court in **John Kennedy and another v. Ranjana and others, (2014) 15 SCC 785**, a suit for partition cannot be dismissed as vexatious on the ground that the suit property was self-acquired property.

15. It must be remembered that the power conferred under Order 7, Rule 11 , as held by the Supreme Court in **P.V. Guru Raj Reddy and another v. P. Neeradha Reddy and another, (2015) 8 SCC 331**, is a drastic power. Therefore, the conditions precedent for the exercise of power are stringent. As a consequence, the averments contained in the plaint have to be read as a whole to find out whether it discloses a cause of action or whether a suit is barred by any law.

16. Therefore, we will have to test the correctness of the judgment of the Court below on the above parameters.

17. At the outset, it should be pointed out that the application for rejection of plaint was filed not by the family members, against whom a claim for partition was made. The application under Order 7, Rule 11 was filed by third party-alienees, who were arrayed as defendants 1 to 6 and 8 to 11.

18. It is needless to point out that when third party-alienees file an application for rejection of plaint, especially in a partition suit, the Courts should exercise caution. This is due to the fact that the third parties may normally be (subject to exceptions) ill equipped to oppose the claim for partition on merits.

19. The application for rejection of plaint in this case was supported by an affidavit sworn to by the 6th defendant in the suit. This affidavit contains 9 paragraphs. The second paragraph contains the reliefs sought in the plaint. Paragraphs 3 to 5 contain a reproduction of the plaint averments. Paragraph 6 states that the plaint averments do not disclose a cause of action and that the suit was frivolous, vexatious and meritless. It is also stated in paragraph 6 that the suit properties did not fall to the share of Namaswamy Buchaiah and that the branch of Namaswamy Buchaiah of which the plaintiff was one, had nothing to do with the properties. It is further claimed in para-6 of the affidavit in support of the application for rejection of plaint that the revenue records viz., Pahani Patrikas for various years from 1960-61 to 2013 stood in the name of Namaswamy Ramaiah and his son Narsimhulu, showing thereby that Ramaiah''s branch alone had the ownership. There are also other averments in para 6 about the development agreement entered into between the defendants 1 to 3, 4 to 6 and 8 to 11 and an allegation that the suit was for extracting money.

20. In paragraph 7 of the affidavit in support of the application for rejection of plaint, the entire focus was on valuation of the suit schedule property and the court fee paid therein. In other words, the contention in para 7 was that the suit was undervalued and insufficiently stamped.

21. In paragraph-8 of the affidavit in support of the application for rejection of plaint, the bar of res judicata is set up. In paragraph 9, the bar of limitation under Article 110 is set up.

22. Thus it is clear from paragraphs 6 to 9 of the affidavit in support of the application for rejection of plaint that the rejection of plaint was sought on 4 grounds viz., a) absence of a cause of action; b) undervaluation and payment of insufficient court fee; c) res judicata; and d) limitation.

23. As we have pointed out elsewhere, limitation is a mixed question of fact and law. The plea of limitation is set up by the respondents 1 to 10 herein on the ground that the plaintiff was ousted from the property more than 12 years ago. But

unfortunately, the starting point for calculating the period of limitation is the date on which the exclusion becomes known to the plaintiff. The factum of exclusion and the date relating to commencement of the period of limitation, are both questions of fact. This is why despite the pleadings by respondents 1 to 10, the Court below did not reject the plaint on the ground of limitation. This is also the reason why the plea of ouster and limitation was not pressed hard even before us by the respondents 1 to 10.

24. In other words, the plaint was not rejected, on the ground of limitation. We are also not called upon to confirm the rejection of the plaint on the plea of limitation.

25. The Court below could not have rejected the plaint on the ground of res judicata. The plea of res judicata is set up by respondents 1 to 10, on the ground that the 17th defendant filed a suit in O.S.No.40 of 2011 seeking the cancellation of the decree in O.S.No.101 of 1969 and failed. But unfortunately, the plaintiff was not a party to the suit. Therefore, the case did not satisfy the parameters of Section 11 of the Code. But unfortunately, the trial Court held that the decree in O.S.No.101 of 1969, in favour of the predecessors-in-title of the 1st defendant operated as res judicata. This is completely contrary to the law on the point. When the very decree in O.S.No. 101 of 1969 is sought to be set aside on the ground of fraud, we do not know how that decree can be construed to operate as res judicata. The finding relating to res judicata in the 3rd unnumbered paragraph in internal page 22 of the judgment of the Court below, is completely contrary to law. The Court did not even examine who were the parties to the previous litigation, what are the subject matter directly and substantially in issue etc. The judgment in a suit which is sought to be set aside in the present suit can never operate as res judicata. Therefore, one of the ground on which the trial Court rejected the plaint, cannot be sustained.

26. The issue relating to undervaluation and payment of insufficient court fee, was not taken up for consideration by the Court below. The plaint was not rejected on the ground of undervaluation. If the Court below wanted to reject the plaint on that basis, a finding ought to have been recorded relating to valuation and an opportunity ought to have been given to the plaintiff to cure the defect. Both did not happen. Therefore, the plaint was not and could not have been rejected on the ground of undervaluation and insufficient stamping.

27. That leaves us with only one issue viz., whether the plaint disclosed a cause of action or not. To be fair to the learned counsel appearing for the respondents 1 to 3 as well as respondents 4 to 6, they focused attention only on the issue of cause of action. According to the learned counsel for the respondents 1 to 6, the properties left behind by the great grandfather Namaswamy Narsimhulu had already been partitioned between Ramaiah and Buchaiah and that all the plaint documents disclosed only the name of Ramaiah. Therefore, the learned counsel contended that when the suit property never stood in the name of Buchaiah, persons belonging to his branch would have no cause of action to seek partition of the properties that

went to the share of Ramaiah and his branch.

28. But the above contention is completely misconceived. In paragraph 2 of the plaint to which our attention was invited, it was nowhere stated that Ramaiah and Buchaiah separated. Even in para 6, there was no averment that both of them partitioned the properties, but on the contrary a categorical assertion was made in para 9 of the plaint to the effect that no partition took place among all the family members at any point of time according to law. Therefore, the contention that in a partition that took place between Ramaiah and Buchaiah, the properties had already fallen to the share of Ramaiah and that therefore, the plaintiff, hailing from the branch of Buchaiah, had no cause of action, is completely meaningless.

29. As pointed out by the Supreme Court in **Kusum Ingots and Alloys v. Union of India (2004) (2) CCC 196 (SC)**, the cause of action implies a right to sue. The expression "cause of action" is not defined in any statute. But it has been judicially interpreted to mean that every fact, which would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court, would constitute a cause of action. Negatively, it would mean that everything which, if not proved, gives the defendant an immediate right to judgment, would be part of cause of action. It is actually a bundle of facts, which, if taken with the law applicable to them, gives the plaintiff a right to relief.

30. It is needless to point out that in suits for partition relating to joint family property, the existence of an ancestral nucleus, the purchase of a property from out of joint family funds, the putting of a property into the common hotchpot of the joint family, the birth of a child and the death of a person, all constitute the bundles of facts, which form the cause of action for partition.

31. Keeping the above principles in mind, if we have a look at the plaint averments, it is seen that the plaintiff belongs to a family whose common ancestor was Mustigulla @ Namaswamy Narsimhulu. While the plaintiff is a descendant from one of the branches of the common ancestor, the respondents 1 to 10 are the alienees of the property from the members of the other branch of the very same common ancestor. Therefore, this is not a case where there is no cause of action for the plaintiff to seek partition.

32. A passionate appeal was made by the learned counsel appearing for the respondents 1 to 6 that they have invested more than about Rs. 100 crores in the development of the suit schedule property and that the suit filed after more than 5 decades, was vexatious and an abuse of process of law.

33. We are unable to sustain the said contention. The respondents may have an excellent case on merits, when the suit is taken up for trial. But the same cannot be a ground for rejection of plaint. The fact that the respondents may have to go through the mill, cannot be a ground for rejecting the plaint, especially when the parameters of Order 7, Rule 11 are not satisfied.

34. Therefore, the appeal is allowed, the judgment and decree of the Court below are set aside and the suit is remanded back to the trial Court. It will be open to the respondents to raise all the defences that are available to them in law and those defences shall be considered by the trial Court with reference to the evidence on record. There will be no order as to costs.

35. As a sequel, miscellaneous petitions pending in this appeal, if any, shall stand closed.