

(2014) 11 MAD CK 0544

Madras High Court

Case No: C.R.P. (PD). No. 2282 of 2014 and M.P. No. 1 of 2014

C.V. Karthikeyan

APPELLANT

Vs

P. Subramaniam

RESPONDENT

Date of Decision: Nov. 19, 2014**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11, Order 7 Rule 11(c), 11
- Tamil Nadu Court Fees and Suits Valuation Act, 1955 - Section 27(c), 37(2)

Citation: (2014) 8 MLJ 513**Hon'ble Judges:** K. Ravichandra Babu, J**Bench:** Single Bench

Judgement

@JUDGMENTTAG-ORDER

K. Ravichandra Babu, J.

The eighth defendant in a suit for partition and permanent injunction, is the petitioner before this Court. The respondents are the plaintiffs therein. The petitioner is aggrieved by the order of the trial Court in dismissing his application filed under Order 7 Rule 11 CPC for rejection of the plaint.

2. The case of the plaintiffs as found in the plaint, in short is as follows:

The second plaintiff is the daughter of the first plaintiff and one late Gomathi. The first defendant is the father-in-law of the first plaintiff, maternal grandfather of the second plaintiff and father of the said late Gomathi. The defendants 2 to 4 are the daughters of the first defendant and defendants 5 to 7 are the husbands of the defendants 2 to 4 respectively and the son-in-laws of the first defendant. The eighth defendant is a stranger to the plaintiffs' family and alleged agreement holder with the first defendant. The first defendant had one son, by name Jeganathan and he died in the year 1985 without any marriage. The ninth defendant is the wife of the first defendant. After the sale of various joint family properties of the plaintiffs and

the defendants 1 to 4, they were vested with a property measuring an extent of 1.98 acres in S.No. 152/2C only, which is the suit property. The said Gomathi became co-sharer in the joint family and was entitled to common 1/5th share in the suit property. The plaintiffs along with the said Gomathi were in joint possession and enjoyment of the suit property. After the death of the said Gomathi, the plaintiffs are entitled to 1/5th share of the said Gomathi, as they succeeded to the common 1/5th share in the suit property. From then on, the plaintiffs are in joint possession of the suit property. The demand by the plaintiffs for amicable partition was refused. Therefore, the plaintiffs have filed the abovesaid suit by elaborately making various allegations and averments.

3. The petitioner as eighth defendant, filed I.A.No. 686 of 2013 in O.S.No. 93 of 2012 before the trial Court under Order 7 Rule 11 CPC seeking for rejection of plaint on the following grounds:

(a) The plaintiffs are not in joint possession or in effective possession of the suit property, and therefore, the Court fee paid with an allegation of joint possession, is not proper.

(b) The defendants filed a suit in O.S.No. 226 of 2005 against the petitioner for injunction and the same was dismissed, holding that they are not in possession. Likewise, the petitioner already filed a suit for specific performance and got a decree in his favour against the defendants and therefore, the present suit is barred by the principle of res-judicata.

(c) The plaintiffs have not included all the joint family properties in the present suit for partition and only shown the property purchased by the petitioner as the suit property. Therefore, the suit is bad on the reason that the plea is for partial partition.

(d) There is no cause of action.

4. The plaintiffs resisted the said application. After hearing both sides, the trial Court rejected the application by holding that there is a specific plea in the plaint that the plaintiffs are in joint possession and enjoyment, and therefore, based on such plea made in the plaint, the Court fee paid is correct. It is further found by the Court below that even if the Court fee paid is not correct, the plaint cannot be rejected on that ground and the same has to be only returned for payment of deficit Court fee. Insofar as the objection with regard to the partial partition is concerned, the trial court found that the petitioner has not come out with the details of other properties available for partition, except saying that there are some more properties omitted to be included in the suit. In any event, the plaint cannot be rejected based on such allegation made by the eighth defendant. Insofar as the question of res-judicata as raised by the eighth defendant is concerned, the trial Court pointed out that neither the plaintiffs nor the said Gomathi were parties to the suits referred to by the eighth defendant, and therefore, the principle of res-judicata cannot be applied to the

present suit. Insofar as the cause of action is concerned, the trial Court has pointed out that the plaint has referred to the cause of action and the petitioner is not correct in contending that there was no cause of action.

5. Mr.M.Balasubramanian, learned counsel appearing for the petitioner reiterated the very same contentions raised before the trial Court and also made his submissions by going into the merits and claim of the respective parties over the suit property. Learned counsel in a nut-shell submitted that even though the plaintiffs are not parties to the earlier proceedings, the findings rendered therein would operate as res-judicata, since such findings are in respect of the very same property and those decisions are judgment-in-rem, for which the plaintiffs need not be party to the proceedings. In support of his submissions, learned counsel relied on an unreported decision of this Court in Application No. 2033 of 2004 in C.S.No. 398 of 2003, dated 29.1.2007 and the Division Bench decisions of this Court reported in [C.E. Sathyanarayana Reddi Vs. C.E. Sulochana, C.E. Surayanarayanan, Samyukta Paramahamsan and Lakshmibanu Jayaprakash](#) and [The Commander Coast Guard Region \(East\), Fort St. George, Chennai-9 and another Vs. O. Konavalov and 4 others,](#) .

6. Per contra, learned counsel appearing for the first respondent submitted that all the points raised by the petitioner were considered in detail by the trial Court and they were rejected by giving valid and justifiable reasons, and therefore, the interference of this Court against that order is not at all warranted. He further submitted that the plaintiffs have never admitted that the suit property is self-acquired property and all along they are contending that it is joint family property and they are in joint possession and enjoyment of the same. The principle of res-judicata is not applicable to the present case, as neither the said Gomathi nor the plaintiffs were parties to the earlier proceedings. He further submitted that for considering the application filed under Order 7 Rule 11 CPC, the Court has to see only the averments made in the plaint to find out as to whether any of the grounds referred to under Order 7 Rule 11 CPC are made out or not and not to go by the averments made in the affidavit filed in support of the application under Order 7 Rule 11 CPC to reject the plaint. In support of his submissions, the learned counsel for the first respondent relied on the decision of this Court reported in [G. Subramani Vs. V. Rajasekaran and S. Radhakrishnan,](#) .

7. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

8. The eighth defendant in a suit for partition is seeking for rejection of the plaint. The first contention is that proper Court fee is not paid, as the plaintiffs are not in joint possession of the suit property. A perusal of the plaint averments would show that the plaintiffs have categorically averred and asserted that they are in joint possession of the suit property and accordingly they have paid the Court fee under Sections 37(2) and 27(c) of the Tamil Nadu Court Fees and Suits Valuation Act, 1955.

Though the eighth defendant contended that the plaintiffs are not in joint possession, such question regarding joint possession is certainly a factual aspect of the matter, which has to be considered and decided only after trial, and therefore, the plaint cannot be rejected on the ground that the plaintiffs have not paid proper Court fee, as contended by the eighth defendant. Even otherwise, rejection of the plaint would arise for not paying proper Court fee only when the plaintiffs failed to pay proper Court fee, even after they were called upon by the Court to pay the requisite Court fee as provided under Order 7 Rule 11(c) CPC. In this case, admittedly, there was no such direction given by the Court and in the absence of the same, the eighth defendant cannot seek for rejection of the plaint on that ground.

9. The next contention is that the suit is filed in respect of only one property without including the other joint family properties, and therefore, the suit is bad for the plea of partial partition. In my considered view, the said objection raised by the eighth defendant cannot be brought under any of the grounds referred to under Order 7 Rule 11 CPC, as such contention is undoubtedly the factual aspect of the matter, which cannot be considered and decided in an application filed under Order 7 Rule 11 CPC, especially when it is not the case of the plaintiffs that there are some more properties available for partition. On the other hand, their categorical case, as pointed out earlier, is that after the sale of the other family properties, the present suit property is the only property left out for partition. Therefore, on this ground also, the plaint cannot be rejected.

10. The next ground urged is that the present suit is barred by the principle of res-judicata. No doubt, the learned counsel for the petitioner vehemently stressed this ground before this Court and submitted that the plaint is liable to be rejected on this ground alone. It is not in dispute that the deceased Gomathi, who is the daughter of the first defendant and wife of the first plaintiff, also the mother of the second plaintiff, was not a party in any of the earlier proceedings referred to by the eighth defendant. It is equally an admitted fact that these plaintiffs are also not parties to those proceedings. According to them, when they are not parties to the earlier proceedings, the same are not binding on them, and therefore, the application of the principle of res-judicata would not arise in this case. The plaintiffs claim their right through the deceased Gomathi, who happened to be one of the daughters of the first defendant. Of course, the petitioner herein obtained a decree in his favour in respect of the suit property, wherein admittedly the said Gomathi was not a party, so also these plaintiffs. Even though the decision was rendered in respect of the same property, when it is the fact that neither the plaintiffs nor the other co-sharer, namely the said Gomathi, through whom these plaintiffs claim their right of partition, are not parties to the earlier proceedings, the applicability of the principle of res-judicata, especially in the above stated facts and circumstances of the present case, is a question which cannot be considered and decided at the threshold while deciding the application under Order 7 Rule 11 CPC itself and on the other hand, the same has to be considered and decided only after full-fledged trial,

since such principle involves mixed question of law and fact. In other words, if the said principle is applicable on the face of the pleadings raised by the plaintiffs in their plaint, without a requirement of culling out of facts and circumstances based on the rival pleadings, through evidence to be let in by the parties, then the plaint can be rejected. On the other hand, if the plaint averments do not disclose any such factual admission, the Court cannot come to the conclusion that the suit is barred by the principle of res-judicata. The point raised by the petitioner as the eighth defendant on the question of res-judicata is necessarily a mixed question of fact and law, which needs to be gone into only by conducting trial and considering the pleadings and evidence of the respective parties. Therefore, on this ground also, the plaint cannot be rejected as claimed by the petitioner.

11. No doubt, learned counsel for the petitioner relied on a Division Bench decision of this Court reported in [C.E. Sathyanarayana Reddi Vs. C.E. Sulochana, C.E. Surayanarayanan, Samyukta Paramahamsan and Lakshmibanu Jayaprakash](#) in support of his submission that the plaint has to be rejected on the ground of principle of res-judicata. It is true that in the abovesaid decision, a Division Bench of this Court has found that the plaint therein is liable to be rejected, since the suit therein was barred by the principle of res-judicata. But a careful perusal of the facts of the said case would show that the said decision is not applicable to the present case, when the facts herein are totally different and distinguishable. The facts of the case before the Division Bench would show that the appellant therein was the plaintiff in C.S.No. 129 of 2007 filed for partition and against whom, already the defendant therein filed a suit in O.S.No. 8620 of 1996 seeking for permanent and mandatory injunction in respect of the very same property, wherein the appellant/plaintiff took a plea that the property belonged to the joint family property. The trial Court however rejected the said contention. Based on the abovesaid facts, more particularly with regard to the fact that the parties are one and same in both the proceedings and the very plea raised by the appellant/plaintiff regarding the status of the suit property therein was rejected earlier by the Civil Court in another proceedings, the Division Bench came to the conclusion that the said suit was hit by the doctrine of res-judicata. Further, the plea of oral partition made by the appellant/plaintiff was also rejected in the other proceedings therein. Considering the above facts and circumstances of that case, I am of the view that the said decision is not applicable to the present case, as the facts in this case are different. First of all, the plaintiffs or their predecessor Gomathi were not parties to the earlier proceedings. Therefore, the question of considering the plea of res-judicata while deciding the application under Order 7 Rule 11 CPC would not arise. It is further to be seen that under sub-clause (d) to Rule 11 of Order 7 CPC, the requirement is that it should appear from the statement made in the plaint that the suit is barred by any law. Therefore, such bar by any law should be apparent on the face of the reading of the plaint and not to be culled out from the pleadings of the defendants and applied.

12. Learned counsel for the petitioner further contended that if a finding is rendered in respect of the same property, it is the judgment-in-rem, and therefore, the plaintiffs are bound by the same. In support of such submission, he relied on the Division Bench decision of this Court reported in [The Commander Coast Guard Region \(East\), Fort St. George, Chennai-9 and another Vs. O. Konavalov and 4 others,](#) . First of all, the said decision was not in respect of considering the application under Order 7 Rule 11 CPC and on the other hand, it arises in respect of the proceedings initiated under the Merchant Shipping Act, 1958. In the said decision, the Division Bench observed that the order of confiscation passed by the Department operates against all, even if they are not parties to the proceedings. Certainly, the facts and circumstances as well as the relevant provision of law made under Merchant Shipping Act, 1958 as well as the Customs Act, are totally different and such findings made in respect of confiscation of goods cannot be applied to the present civil dispute arising between private parties. It is well settled that if a decision is rendered in a civil dispute, such decision is binding only on the parties to the proceedings, unless the contra is established and proved. Therefore, as pointed out earlier, it is for the eighth defendant herein to establish and prove before the trial Court that the decree passed in his favour in the earlier proceedings, would be binding on the plaintiffs also. Such exercise has to be done only by participating in the trial and not by filing the application under Order 7 Rule 11 CPC, especially when such contentions are stoutly denied by the plaintiffs.

13. The other unreported decision of this Court in Application No. 2033 of 2004 in C.S.No. 398 of 2003, dated 29.1.2007, relied on by the learned counsel for the petitioner, is also not applicable to the present facts and circumstances of the case, as I find that there is no abuse of process of Court, as contended by the learned counsel for the petitioner herein.

14. This Court, in the decision reported in [G. Subramani Vs. V. Rajasekaran and S. Radhakrishnan,](#) considered the applicability of the principle of res-judicata while considering the application under Order 7 Rule 11 CPC and found that the plaint cannot be rejected on the basis of defence made in the written statement and the bar of res-judicata is an issue to be raised and decided, but not as a ground to reject the plaint. Paragraph 11 of the said decision reads as follows:

"11. The other contention that the decision of the Registrar of Firms that the retirement date was genuine and valid would operate as res judicata and hence, the same shall be a statutory bar for the present Suit is also bound to be rejected, because the learned Counsel is not in a position to show any provision which says that the decision of the Registrar of Firms shall be final and that Civil Court's jurisdiction to go into the question stands barred. Even otherwise, the question of bar of res judicata shall not be the ground on which a Plaint can be rejected. What Section 11 of the Code of Civil Procedure says is that a question, which has been substantially and directly raised as an issue in a previously decided Suit, shall not be

tried by the Court dealing with the subsequent suit. So, the said provision can be interpreted to mean that such a Suit can be dismissed on the ground of bar of res judicata and it cannot be stretched too much to say that the bar of res judicata shall be the ground for rejection of the Plaint. The question of res judicata shall be a mixed question of law and fact. It has got to be raised and decided. A Plaint can be rejected based on the pleadings made in the Plaint and the documents produced along with the Plaint. A Plaint cannot be rejected based on the defence statement of the Defendant made in the Written Statement or any averment made in the Affidavit filed in support of the Application filed under Order 7, Rule 11 of the Code of Civil Procedure."

15. It is well settled that plaint should be rejected only when the requirement as contemplated under Order 7 Rule 11 CPC is pleaded and proved. Such pleading in support of the application filed under Order 7 Rule 11 CPC raising any of the grounds set out therein, should straightaway pinpoint to the relevant averments made in the plaint supporting the claim of the defendant made in his application under Order 7 Rule 11 CPC. In other words, the plaint averments on the face of it, must show that the case of the party who files an application under Order 7 Rule 11 CPC is made out. On the other hand, if the grounds raised by the party in his application under Order 7 Rule 11 CPC require further enquiry or probing of the matter, which otherwise is not possible without conducting a trial, the plaint cannot be rejected simply based on the allegation made by the party who filed the said application. It is needless to say that rejection of the plaint is an extreme step in a suit proceedings, since such rejection amounts to dismissal of the suit even before considering the claim of the plaintiff by conducting trial. It is also to be noted that such application can be filed by the defendant even before filing the written statement or at any time thereafter. Therefore, such exercise of considering the application under Order 7 Rule 11 CPC should be done by the trial Court with utmost care and caution, since the right of a party to have a full-fledged trial cannot be denied at the threshold by rejecting the plaint based on the averments contained in the application alone, unless the grounds raised in such application are also justified through a plain reading of the plaint itself.

16. Considering all the above facts and circumstances, I am of the view that the impugned order of the Court below in rejecting the application is just and proper and does not warrant any interference. Accordingly, the Civil Revision Petition fails and the same is dismissed. No costs. The Miscellaneous Petition is closed.