

(2000) 08 PAT CK 0005
In the Patna High Court
Case No : Civil Revision No. 2414 of 1999

Smt. Mahamaya Verma

APPELLANT

Vs

Amarendra Nath Verma and Others

RESPONDENT

Date of Decision : 29-08-2000

Acts Referred:

Specific Relief Act, 1963 — Section 3(1)

Citation : (2001) 2 CivCC 667

Hon'ble Judges : P.K. Deb, J

Bench : Single Bench

Advocate : Shashi Shekhar Dwivedi, Mr. Vivekanand Pathak and Mr. Shambhu Sharan Singh, for the Appellant; Amarendra Nath Verma (in person), Mr. Ashwini Kr. Rai and Mr. Sushila Mishra, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Deb, J.—This revision petition has been preferred against the order dated 8.10.1999 passed by Sub Judge IV, Bettiah, in Partition Suit No. 13 of 1996 whereby and whereunder the petition filed by defendant No. 10 petitioner under Order VII, rule 11 of the CPC for rejection of the plaint has been rejected.

2. The plaintiffs-opposite parties filed the suit for partition of the joint family property and injunction restraining the defendants from making alienation and also with the prayers that the compromise decree in earlier Title Sit No. 16 of 1985 was illegal, fraudulent and not binding on the plaintiffs and also for declaration of the sale-deed executed by defendant No. 1 on the basis of such compromise decree as void. The plaintiffs did not pay ad valorem Court fee and paid Court fee to the extent of fixed one in respect of prayer for partition and for valuation fixed by the plaintiffs for the purpose of other reliefs. Defendant No. 10 without filing written statement on earlier occasion filed a similar petition under Order VII, rule 11 of the CPC and main contention was that unless ad valorem Court fee was paid, the suit was not maintainable. It was also contended that the suit was not maintainable as in the earlier partition suit the father of the plaintiffs

was defendant No.6 and he himself had signed as Karta of the joint family in the compromise decree and, as such, plaintiffs claiming through him cannot attack the same partition as it should be construed as a res judicata. Limitation was also claimed in respect of the sale deed and also regarding the maintainability of the suit being based under Order XXIII, rule 3 of the Code of Civil procedure. The said petitioner, after rejoinder being filed, was disposed of vide order dated 7.5.1996 and the operative part of the order was to the extent that if ad valorem Court fee is not paid, the plaint shall be treated as rejected under Order VII, rule 11 of the Code of Civil procedure. The said order was challenged by the plaintiffs in Civil Revision No.804 of 1996. After hearing both the parties the said revision petition was dismissed holding that the plaintiff shall have to pay ad valorem Court fee. Then to avoid ad valorem Court fees, the plaintiffs opposite parties had withdrawn the reliefs claimed in Item Nos.C and D regarding declaration of the earlier compromise decree to be void and the sale-deed executed by defendant No. 10 be invalid. Such prayer of amendment of the plaint was allowed under Order VI, Rule 17 of the Code of Civil procedure. Against that order of allowance of amendment, the present petitioner preferred a revision petition before this Court. The main contention was that although the reliefs have been withdrawn by the plaintiffs but the averments regarding the earlier compromise decree and the sale-deed remained as it was in the plaint itself and, as such, there was apprehension in the mind of defendant No. 10 that although the reliefs have been withdrawn on the basis of the averments in the plaint, there may be an occasion to grant equitable reliefs as contemplated under Order VII, Rule 7 of the Code of Civil Procedure. The revision petition filed by the petitioner with such apprehension was dismissed holding that there was no genuine apprehension in the mind of the petitioner as when the reliefs had once been withdrawn by the Court's order, there was no scope for granting such reliefs under the purview of equitable relief under Order VII, rule 7 of the Code of Civil Procedure.

3. Now again defendant No. 10 without filing written statement has filed a petition under Order VII, Rule 11 of the CPC for rejection of the plaint almost on the same averments as mentioned in the earlier petition except that of Court fee matters and it was contended that there was already a decision to that effect regarding rejection of the plaint as contained in para 11 of the earlier order dated 7.5.1996 and hence the plaint should be rejected. The learned Court below after considering the petition and the rejoinder thereof held by the impugned order that defendant No. 10 i.e. the petitioner is making petition after petition on the same contentions again and again but not filing written statement. It was held that the maintainability point can be considered even on a preliminary issues as contemplated under Order XIV, Rule 2(2) of the CPC but before that the petitioner is required to file written statement as there was no scope to entertain such a petition under Order VII, rule 11 of the Code of Civil Procedure.

Mr.Dwivedi, learned Senior counsel for and on behalf of the petitioner, has put much emphasis of para 11 of the earlier order which runs as follows:

"11. Considering the aforesaid facts and the law points involved in this case it appears to me that the suit is barred by estoppel, limitation and in terms of Section 3(1) of the Specific Relief Act. The suit is also barred by Principle of res judicata and the plaint is liable to be rejected under Order VII, Rule 11 of the Code of Civil Procedure."

Although such observation was there in the order itself but the operative part of the order is there in paragraph 13 which runs as follows:

"13. Considering the aforesaid facts and circumstances of the case and in the interest of justice the plaintiffs are directed to pay ad valorem Court fee on the total valuation of the suit failing which the plaint shall be treated as rejected under Order VII, Rule 11 of the Code of Civil Procedure. Accordingly, the petition, filed by Mahamaya Verma, defendant No. 10 in this case on 15.2.1996 is hereby accepted."

Thus, it appears that although some observation is there by the Court below in the earlier order regarding the suit being barred by res judicata, limitation and non-maintainability etc. but those were in the context of the earlier plaint when no ad valorem Court fee was paid and ultimately it was decided that the suit may be proceeded if ad valorem Court fee is paid. On the point of ad valorem Court fee revision petition was preferred as already mentioned above and no where it was raised from the side of the petitioner either before this Court or before the Court below that when such observation was there then the plaint ought to have been rejected whether ad valorem Court fee is paid or not rather both parties submitted to the jurisdiction regarding the payment of the ad valorem Court fee alone. This Court in revision petition held that ad valorem Court fee must be paid and to avoid that amendment was made in the plaint and the reliefs for which ad valorem Court fee was asked to be paid have been delayed by the plaintiffs. Such amendment was also challenged by the petitioner before this Court but at that time also no plea was taken that the learned Court below had already held that the plaint should be rejected under Order VII, Rule 11 of the Code of Civil Procedure. Then again the present petition has been filed to reject the plaint. The contention of the petitioner as has been reiterated before this Court is that the earlier suit was compromised between the father of the plaintiffs and defendant No. 10 and others co-sharers wherein defendant No. 10 was the plaintiffs and it is the contention of the petitioner that father of the plaintiffs represented the suit as karta of the joint family and, as such, he was representing the plaintiff also. This submission have been vehemently objected to from the side of the plaintiffs opposite side parties to the effect that nowhere in the earlier plaint the father of the plaintiffs was added as Karta of the joint family nor the plaintiff who were then minors were made parties to the suit. It has further been contended that the earlier suit was in respect of the part of the property and the present prepartition suit in respect of the whole of the joint family property and the plaintiffs being the coparceners have got the right to file a partition suit as there is recurring cause of action for the purpose of partition. It has further been

submitted that even if the plaintiffs share was also included by the father in the earlier suit but admittedly when they were minors then on attainment of majority they can avoid such partition and the same is the matter of evidence which can be thrashed out only at the time of trial of proper pleadings taken in the written statement and at this stage there is no scope on the ground of maintainability to reject the plaint under Order VII, Rule 11 of the Code of Civil Procedure. It has again been submitted that the question of res judicata does not arise in the present case as the plaintiffs were never parties in the earlier suit and the earlier suit was disposed of on compromise without specifically deciding the disputed points or the issues. In the present case the plaintiffs are not claiming through their father rather they are claiming as coparceners, as such, the suit is definitely maintainable and in this respect a Judgment of the Apex Court as in Smt. Sukhrani (Dead) by L.R.S. and Others Vs. Hari Shanker and Others, , has been referred to. It has also been contended very fairly by the learned counsel for the opposite parties that even if res judicata is not applicable then also the question of estoppel may come in the principle of estoppel is not a point of law alone but it is mixed question of law and facts and that can be decided only after thrashing out the evidence and the trial. As the relief of the sale deed and the compromise decree being void have been withdrawn then at this stage the question of limitation does not come into play on the face for it. Thus, it is submitted that there is no scope to entertain the petition under Order VII, rule 11 of the CPC and the learned Court below has rejected the same very rightly.

4. Mr.Dwivedi has submitted that on principle, of consideration of Order VII, Rule 11 of the CPC may be made at any stage if the plaint itself is not worth for going into trial as the same has been incorporated with the very purpose of not (sic) dragging party into a protracted trial.

5. On careful consideration of the submissions of the learned Counsel for the parties and on perusal of the copy of the plaint which has been annexed with this revision petition. I am of the firm opinion that as the plaint stands it cannot be said that the same did not disclose cause of action for a suit or that the same on the face of it being barred by limitation or principle of any other law. Whether the suit in the present form is maintainable or not or the plaintiffs are estopped from filing the suit is a matter which can be considered from filing the suit is a matter which can be considered after the written statement is filed and the same evidence is being adduced by the parties. Order VII, rule 11 of the CPC applies only when the disclosures made in the plaint are not worth of any cause of action for going into a trial or being barred by any statute or principle of law. The extraneous matters cannot be considered to reject the plaint. The consideration is only on the basis of the contents of the plaint alone. It appears in the present case that the petitioner-defendant No. 10 as taking various stands to attack the contents of the plaint but without filing written statement. Learned Court below has rightly held that the contention of the petitioner-defendant No. 10 might have much force regarding the consideration of the maintainability of the suit but that can only be done even at the preliminary issue, if necessary, as

contemplated under Order XIV, Rule 2(2) of the CPC after the written statement is filed and issues are framed. In such a position and circumstances, I do not find that the learned Court below has committed any error of law or any jurisdictional error in disposing the petition under Order VII, rule 11 of the CPC filed by the petitioner.

6. Hence, there is no force in this revision petition and the same is rejected but no order as to costs.