

HIGH COURT OF KARNATAKA

**Bench: Hon'ble Mrs. Justice Anu Sivaraman and Hon'ble Mr. Justice
Anant Ramanath Hegde**

Date of Decision: 19th June 2024

Case No.:

REGULAR FIRST APPEAL NO. 1300 OF 2022 (PAR)

APPELLANT(S):

SMT. GANGAMMA (DECEASED)

1A. SRI KUMAR N., S/O LATE NAGARAJU

1B. SRI SHIVA MAHADEV N., S/O LATE NAGARAJU

1C. SMT PUSHPA, D/O LATE NAGARAJU

1D. SRI SHIVANE GOWDA, S/O LATE NAGARAJU

1E. SMT SARASWATHAMMA, D/O LATE NAGARAJU

SMT. BHAGYAMMA, W/O SHIVALINGAIAH

SMT. MANGALA, W/O VENKATESH

SMT. VIJAYA. M, W/O MANJUNATH

VERSUS

RESPONDENT(S):

SMT. THOLASAMMA, D/O LATE LAKSHMANAPPA

SRI. LENKAPPA, S/O LATE LAKSHMANAPPA

SMT. VAJRAMMA, D/O LATE LAKSHMANAPPA

SMT. SHARADAMMA, D/O LATE LAKSHMANAPPA

SMT. VARADAMMA, W/O LATE LAKSHMANAPPA

SRI. HANUMANTHARAYAPPA, S/O LATE LAKSHMANAPPA

SRI. VENKATASWAMY, S/O LATE LAKSHMANAPPA

SMT. GOWRAMMA, W/O LATE LAKSHMANAPPA

SMT. MAALAMMA, W/O LATE CHOWDAPPA

SRI. VAJRAPPA, S/O LATE LAKSHMANAPPA

SRI. MANJUNATH, S/O LATE LAKSHMANAPPA

SMT. DHANALAKSHMI, W/O LATE LAKSHMANAPPA

SMT. MUNILAKSHMAMMA, D/O LATE MUDDANNA

SRI. THIMMAPPA, S/O LATE MUDDANNA

SRI. MANJUNATH, S/O LATE MUDDANNA
SRI. SUBHASH, S/O LATE MUDDANNA
SRI. ASHWATHA, S/O LATE NARAYANASWAMY
SMT. VAJRAMMA, S/O LATE NARAYANASWAMY
SRI. CHOWDAPPA, S/O LATE NARAYANASWAMY
SRI. MUNIRAMU, S/O LATE NARAYANASWAMY
SMT. GANGAMMA, D/O LATE NARAYANASWAMY
SRI. MUNIKRISHNA (DECEASED)
SMT. GOWRI, S/O LATE NARAYANASWAMY

Legislation:

Order VII Rule 11(a) and (d) of the Code of Civil Procedure (CPC)

Order XXIII Rule 1(a) and 1(4)(b) of the CPC

Subject: Appeal arising from the rejection of a plaint in a suit for partition and separate possession, based on contentions of no cause of action, limitation, and bar under Order XXIII Rule 1(4)(b) of the CPC due to prior withdrawal of a similar suit.

Headnotes:

Civil Procedure – Rejection of Plaint – Cause of Action and Limitation:

Appeal against the trial court's rejection of a suit for partition under Order VII Rule 11(a) and (d) CPC – Appellants contended the plaint disclosed cause of action and was within limitation – Trial court had dismissed the suit citing absence of cause of action and barred by limitation due to an earlier suit's withdrawal without liberty to file afresh – High Court observed that the plaint disclosed necessary facts constituting cause of action and limitation issues required trial consideration – Rejection of plaint deemed inappropriate at preliminary stage [Paras 1-14].

Order XXIII Rule 1(4)(b) CPC – Bar on Fresh Suit:

Withdrawal of previous suit based on defendants' assurance to settle – High Court noted withdrawal memo indicated potential settlement, not a simple abandonment – Held plaintiffs did not lose right to file fresh suit as new cause of action arose from breach of assurance – Cited coordinate bench decision affirming maintainability of second suit for partition in similar circumstances [Paras 15-20].

Suppression of Facts – Material Impact on Suit:

Trial court erred in dismissing suit solely on ground of suppression of previous suit – High Court highlighted necessity of trial to determine true nature of alleged partition – Directed plaintiffs to deposit Rs. 1 lakh to safeguard defendants' interests pending trial [Paras 23-27].

Decision:

Impugned order and decree set aside – Suit restored for trial on merits – Plaintiffs to deposit Rs. 1 lakh within six weeks – Trial court to determine partition claims considering both parties' contentions [Paras 28-29].

Referred Cases:

- Tippawwa vs Vithal and Another
- S K Lakshminarasappa vs B Rudraiah & Others
- Sarguja Transport Service vs State Transport Appellate Tribunal, M.P.
- Bakhtawar Singh vs Sada Kaur
- Secretary, Bangalore Turf Club vs Kishan Srivastava
- M/s. Seemax Construction (P) Ltd vs State Bank of India

Representing Advocates:

For Appellants: Sri D L N Rao, Senior Counsel with Sri Venkatesha T S, Advocate

For Respondents: Sri Lakamapurmath Chidanandayya, Advocate for C/R15, R1, R5, R8, R12, R14, R16, R17, R19, R20; Sri K Srinivasa, Advocate

JUDGMENT

1. This appeal is arising from the decree dated 09.06.2022 in O.S. No.264/2022 on the file of II Additional Senior Civil Judge, Bangalore Rural District, Bangalore pursuant to the order on I.A.No.II rejecting the plaint invoking Order VII Rule 11 (a) and (d) read with Order XXIII Rule 1(a) of Code of Civil Procedure (for short 'Code').

2. The plaintiffs/appellants filed the aforementioned suit claiming partition and separate possession. The prayer reads as under:-

- "a). To effect partition and separate possession of the suit schedule properties and put the plaintiff in the possession of her legitimate 1/24th share.*
- b). Grant such other relief as this Hon'ble Court may deem fit in the facts and circumstances of the case. And also award costs of the suit in the interest of justice and equity."*

3. The defendants filed I.A.No.II under Order VII Rule 11 (a) and (d) read with Order XXIII Rule 1(a) of the Code contending that there is no cause of action to suit, the suit is barred by limitation and barred under Order XXIII Rule 1(4)(b) of the Code as the plaintiffs have withdrawn the earlier suit for the same relief in respect of the same subject matter, in O.S. No.2973/2006 without seeking liberty to file a fresh suit. The said suit is withdrawn in terms of the memo dated 21.11.2007.

4. The trial Court accepted the plea of the defendants and allowed the application and rejected the plaint. Hence, the present appeal by the plaintiffs.

5. Heard the learned Senior counsel Sri D.L.N. Rao appearing for the appellants and the learned counsel Sri Lakamapurmath Chidanandayya appearing for Caveator/ respondents No.1, 5, 8, 12, 14, 16, 17, 19 and 20.

6. Learned Senior counsel would urge that the plaint averments disclosed the cause of action and the plaint could not have been rejected under Order VII Rule 11 (a) of the Code. It is also urged that from the plaint averments, it cannot be said that the suit is barred by limitation.

7. It is also urged that the first suit was withdrawn on the assurance of the defendants who agreed for the division of the suit properties if the suit is withdrawn. Thus, it is urged that the withdrawal of the suit is not a withdrawal simpliciter and Order XXIII Rule 1 (4)(b) of the Code has no application.

8. Learned counsel for respondents No.1, 5, 8, 12, 14, 16, 17, 19, and 20 submits that the plaintiffs have suppressed the fact that they had filed a suit earlier for the same relief and the said suit is withdrawn on 21.11.2007 without the leave of the Court to file a fresh suit. Thus, the suit is not maintainable in view of the bar contained under Order XXIII Rule 1 (4) (b) of

the Code. Learned counsel would also submit that the plaint does not disclose the cause of action and the suit is barred by limitation as the suit is not filed within 12 years from the date on which the cause of action is pleaded in the earlier suit.

9. This Court has considered the contentions raised at the bar.

10. Order VII Rule 11(a) and (d) of the code read as under:-

11. *Rejection of plaint— The plaint shall be rejected in the following cases:—*

(a) *where it does not disclose a cause of action;*

(b) xxxx

(c) xxxx

(d) *Where the suit appears from the statement in the plaint to be barred by any law.*

xxxx

11. On a reading of the aforementioned provision, it is evident that the plaint can be rejected under Order VII Rule 11(a) of the Code, if the plaint does not disclose the cause of action. Under Order VII Rule 11(d) of the Code, if the suit appears to be barred by any law from the averment made in the plaint, the plaint has to be rejected.

12. On perusal of the plaint, it is noticed that the plaintiffs pleaded about the relationship, nature of the property, the demand for share, and the refusal by the defendants to have the partition. These bundle of facts narrated in the plaint constitutes a cause of action to have recourse in the court of law. Thus, the ground under Order VII Rule 11 (a) of the Code is not available to reject the plaint.

13. The defendants also contend that the suit is barred by limitation. This contention is based on the premise that in the earlier suit filed in 2006, the plaintiffs have stated that the defendants have refused to give

the share to the plaintiffs. Thus, it is urged that the present suit instituted is time barred.

14. It is relevant to note that in the present suit, the plaintiffs have stated that the cause of action to file a suit for partition arose in the year 2022. It is a settled position of law that for suit for partition, the limitation is 12 years from the date of the ouster. Thus, the burden is on the defendants to establish the ouster. The plaint averments do not indicate the ouster. Thus, the plaint cannot be rejected on the plea of limitation at this stage based on the plea of limitation in the written statement.

15. Now the question is whether the suit is hit by Order XXIII Rule 1(4)(b) of the Code. Before that, it is relevant to refer to the memo dated 21.11.2007 filed in the earlier suit, resulting in the withdrawal of the suit. The memo reads as under:-

"The Plaintiffs submit that the Defendants have promised and assured the Plaintiffs that, they are going to give due share to the Plaintiffs over the schedule properties once the suit is withdrawn. Taking into consideration of the promise and assurance of the Defendants, the Plaintiffs are seeking the leave of this Hon'ble Court to withdraw the above suit by the Plaintiffs in view of the likelihood of settlement outside the Court.

Wherefore, it is prayed for orders accordingly to meet the ends of justice. "

16. From the said memo, it is evident that the suit is withdrawn relying on the assurance of the defendants that the plaintiffs will be given the share in the suit properties once the suit is withdrawn. It is also relevant to note that the defendants have not objected to the said memo. This *prima facie* presupposes that some understating was arrived at by the parties relating to the division of properties. The existence of such understanding between the parties can also be inferred as the defendants have taken a stand that they have given a share to the plaintiffs after the suit was withdrawn. The facts and circumstances narrated above would indicate that the plaintiffs did not abandon their claim and they have withdrawn the suit as the defendants allegedly promised to give the plaintiffs' share in the suit properties.

17. Now it is necessary to refer to the relevant portion of Order XXIII Rule 1 of the Code which reads as under:-

"[1. Withdrawal of suit or abandonment of part of claim.—

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim: xxxxx.

(2) xxxxx

(3) Where the Court is satisfied,—

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of suit or part of a claim, it may, on such terms as it thinks fit grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of a claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in subrule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject matter or such part of the claim.

(5) xxxxxxxxxxxxxx

18. It is to be noticed that Order XXIII Rule 1(4)(b) of the Code refers to the withdrawal of the suit or part of the suit without permission referred to in Sub-rule (3). Sub-rule (3) deals with two situations namely; (a) where the Court is of the view that the suit must fail by reason of some formal defect, (b) where the Court finds that from the sufficient grounds for allowing the plaintiff to institute a suit afresh for the subject matter of a suit for part of their claim. The case of the plaintiffs does not fall under either of the two categories. The suit is not withdrawn for want of formal defect. The suit is withdrawn on the alleged assurance of the defendants who agreed to give a share to the plaintiffs on the suit being withdrawn. Since the plaintiffs claimed to be in joint possession of the suit property both in the earlier suit as well as present suit, and assuming that the defendants are in possession, considering the principle that possession of one co-sharer is the possession of another, withdrawal of the suit, on the premise that the matter is likely to be settled out of the Court, does not take away the plaintiff's right over the

property, if any, and in such a situation, permission is not warranted to file a fresh suit for the same relief.

19. The defendants did not object to the memo of withdrawal which referred to some kind of agreement between the parties, prima facie it is forthcoming that the plaintiffs were allegedly assured a share in the property after the suit was withdrawn. In case, the defendants do not honour the promise, it would constitute a new cause of action for the plaintiffs and to institute a suit on a new cause of action in a suit for partition, permission is not required. In the light of the circumstances, the contention based on Order XXIII Rule 1(4)(b) of the Code cannot be made applicable as the withdrawal of the suit is not with an intention to file a similar suit, for similar relief on the cause of action shown in the earlier suit. Now the suit is filed on a different cause of action i.e., breach of assurance.

20. It is also relevant to note that in a situation where the suit for partition is withdrawn by filing a memo and without seeking liberty to file a fresh suit, the co-ordinate bench of this Court in the case of **TIPPAWWA vs VITHAL AND ANOTHER**¹ has held that the second suit for partition is maintainable. In the said judgment, the co-ordinate bench of this Court has followed another judgment of the co-ordinate bench of this Court in **S K LAKSHMINARASAPPA DEAD BY LRS vs SRI B RUDRAIAH & OTHERS**². In the said judgment, while dealing with the scope of Order IX Rules 8 and 9 of the Code, the Court has held that the right to sue partition survives till the properties are divided by metes and bounds. It is further held that there is a recurring cause of action for the party claiming partition. In that view of the matter, this Court is of the view that the second suit for partition is maintainable and same cannot be dismissed at the threshold in exercise of jurisdiction under Order VII Rule 11 and Order XXIII of the Code.

21. This Court has also considered the following judgments cited in support of the respondents:

1. *Sarguja Transport Service vs. State Transport Appellate Tribunal, M.P., Gwalior and Others - (1987) 1 SCC 5.*
2. *Bakhtawar Singh and Another vs. Sada Kaur and Another - (1996) 11 SCC 167.*

¹ RFA 200081/2015

² ILR 2012 Kar 4129

3. *The Secretary, Bangalore Turf Club vs. Kishan Srivastava - I.L.R. 1996 KAR 1905.*
4. *M/s. Seemax Construction (P) Ltd vs. State Bank of India and Another - AIR 1992 DELHI 197.*

22. It is to be noticed that in all those cases, the suit or the petitions have withdrawn without showing any cause and without referring to any arrangements between the parties to the proceedings. Whereas, in the case on hand, the memo speaks about an alleged agreement relating to the division of the properties between the parties. Hence, the principles laid down in the judgments are not attracted.

23. On going through the orders passed by the trial Court, it is noticed that the trial Court has given a finding that the plaintiffs have suppressed the material facts and have filed a suit again claiming share in the suit properties after withdrawing the earlier suit. Such a finding could not have been given without there being a trial. The trial Court is carried away by the statement in the plaint where the plaintiffs have stated that they have not filed any other suits concerning the same cause of action either in the past or present touching the subject matter of the plaint. Though, there is suppression of earlier suit, that alone cannot be the ground for dismissal of the suit for partition if at all the plaintiffs are having a share in the suit properties. Suppression of fact in the previous suit may result in some other consequences but not a dismissal of the suit, the plaintiffs are able to establish that there is no partition in the family.

24. Since the defendants have taken the stand that there was a partition after the withdrawal of the earlier suit, it is always open to the defendants to establish the defence during the trial.

25. Before parting, it is noticed that the suit is filed without disclosing the earlier suit and its withdrawal. The defendants have pleaded that the partition has taken place after the withdrawal. The plaintiffs now are contending that the partition has not taken place even after the withdrawal of the earlier suit. If the defendants are able to establish the partition pleaded in the written statement, then the second suit of the plaintiffs amounts to gross abuse of the process of the Court. Under these circumstances, this Court deems it appropriate that the plaintiffs shall deposit Rs.1 lakh before the trial Court and the same shall be kept in an interest-earning deposit till the disposal of the suit.

26. In case before the trial Court, the previous partition is established by the defendants, the trial Court shall award the amount in deposit as the cost of the proceeding.

27. Six weeks time is granted to the appellants to deposit Rs.1.00 lakh referred to above.

28. For the reasons stated above, this Court is of the view that the impugned order and decree dated 09.06.2022 are not sustainable, accordingly set-aside. Consequently the suit in O.S.264/2022 on the file of the II Additional Senior Civil Judge, Bengaluru Rural District, Bengaluru is restored to file for consideration on merits.

28. It is also made clear that nothing is expressed on merits and all contentions are kept open.

29. Registry to return the Trial Court Records forthwith.