Kamala & Ors vs K.T. Eshwara Sa & Ors on 29 April, 2008

Equivalent citations: AIR 2008 SUPREME COURT 3174, 2008 (12) SCC 661, 2008 AIR SCW 5364, 2008 (6) AIR KANT HCR 51, (2008) 67 ALLINDCAS 33 (SC), 2008 (7) SCALE 436, (2009) 1 CLR 743 (SC), 2008 (67) ALLINDCAS 33, (2008) 6 ALLMR 61 (SC), 2009 (74) ALL LR 68 SOC, 2008 (6) ALL MR 61 NOC, (2008) 105 REVDEC 296, (2008) 7 SCALE 436, (2008) 3 ALL RENTCAS 589, (2008) 3 ALL WC 2776, (2008) 3 CIVILCOURTC 681, (2008) 5 MAD LJ 617, (2008) 3 RECCIVR 199, (2008) 72 ALL LR 476

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Bench: S.B. Sinha, V.S. Sirpurkar

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           CASE NO.:
Appeal (civil)  3038 of 2008

PETITIONER:
Kamala & Ors

RESPONDENT:
K.T. Eshwara Sa & Ors

DATE OF JUDGMENT: 29/04/2008

BENCH:
S.B. Sinha & V.S. Sirpurkar

JUDGMENT:
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J U D G M E N T REPORTABLE CIVIL APPEAL NO. 3038 OF 2008 [Arising out of SLP (Civil) No. 9222 of 2007] S.B. SINHA, J :

1. Leave granted.

2. Application of Order VII, Rule 11(d) of the Code of Civil Procedure (for short "the Code") in the facts and circumstances of this case, is involved in this appeal which arises out of a judgment and order dated 13.02.2007 passed by a Division Bench of the High Court of Karnataka at Bangalore.

3. The relationship between the parties is not in dispute, as would appear from the genealogical tree:

Allegedly, the eldest son of Kabadi Gopalsa went out of the joint family by executing a

registered Deed of Release upon taking his share in the ancestral property on or about 10.03.1918.

4. A partition is said to have taken place between two sons of Chinnusa, i.e., Kabadi Giddusa and Kabadi Gopalsa on or about 1.05.1926. Kabadi Gopalsa died in 1947.

5. There exists a dispute as to whether the properties in suit were divided amongst the four sons of Kabadi Gopalsa. However, admittedly, a suit was filed by Ramusa (son of Gopalsa) against his mother and three brothers in respect of three house properties being Item Nos. 1, 2 and 3 and the Revenue land (Item No. 4). Defendant No. 3 in the said suit was the grand father of the deceased husband of the appellant No. 1 in the present case.

6. It is not in dispute that on or about 11.11.1952, the properties which allegedly fell to the share of Chikka Chinnusa was auction sold in favour of one Moolchand Sharma in execution of a decree passed against him in OS No. 311 of 1948-49 being Execution No. 421 of 1950-51.

7. A preliminary decree was passed by the Trial Court declaring 2/9th share of the plaintiff. It is, however, conceded at the Bar that the said decree was rectified declaring the share of the plaintiff to be 1/4th in the joint family property. A final decree proceedings was initiated. During the pendency of the said proceedings, Moolchand Sharma sold his land in Survey Nos. 22 and 23 admeasuring 1 acre 0.38 guntas, Survey No. 48/2 admeasuring 0.32 guntas and Survey No. 48/5 admeasuring 0.13 = guntas to Munimarappa.

A final decree was said to have been passed on 11.06.1955. Yet again, Ramusa executed a registered deed of sale on 30.08.1956 in favour of R. Vittal Sa in respect of 2 acres and 1 > guntas in Survey Nos. 22 and 23, 0.29 > guntas in Survey No. 47/2 and 0.13 = guntas in Survey No. 48/5. Dodda Chinnusa executed a registered deed of sale on 2.09.1956 in favour of K.G. Daktappa in respect of 2 acres and 1 > guntas in Survey Nos. 22 and 23, 0.29 > guntas in Survey No. 47/2 and 0.13 = guntas in Survey No. 48/5.

8. By an order dated 18.06.1956, the Trial Court directed the Commissioner to demarcate the lands falling in the share of the plaintiff and allot to him. Various interlocutory proceedings were initiated and several orders were passed thereupon. As noticed hereinbefore, the preliminary decree was amended declaring 1/4th share of the plaintiff and the defendant Nos. 1 to 3 with respect to all the properties by reason of an order dated 27.02.1963. Whereas according to the respondents, the parties had taken possession of the properties fallen in their respective shares and had been enjoying and even alienating them to the third parties, the appellant strenuously denied and disputed the same.

An order of injunction was passed in the said suit being OS No. 15 of 1953 by an order dated 20.03.1963 restraining the defendant No. 2 from transferring the suit schedule properties on the

premise that the joint family property had not been divided by metes and bounds. However, while setting aside the said interim order of injunction, the learned Court by an order dated 7.07.1967 observed as under:

> (i) On 27.02.1963, the preliminary decree was amended and 1/4th share of Plaintiff and Defendants 1 to 3 was defined.
>
> (ii) Item No. 4 of the suit property is revenue property.
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> (iii) Defendant No. 3 (grandfather of deceased husband of Plaintiff Appellant herein) has sold its share in Item No. 4 of the plaint schedule property.
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> (iv) 'The suit is pending till the final decree is passed. No final decree as such has been passed in this suit concerning the 4th item of the plaint schedule. It is true that the Civil Court has to simply forward the preliminary decree to the Collector for purposes of partitioning the same and that the Civil Court has no jurisdiction to correct or review the partition that may be made by the Collector'.

The final decree proceeding was, however, dismissed for default on or about 03.09.1974.

9. Respondent No. 1 thereafter filed a partition suit against Respondent No. 2 in the Court of City Civil Judge at Bangalore which was marked as OS No. 6180 of 2003. The said suit was dismissed as not pressed.

10. Appellant has filed a suit which was marked as OS No. 6352 of 2004 claiming partition in the properties, being the same as were described as Item Nos. 1, 2, 3 and 4 of the schedule appended to the plaint in OS No. 15 of 1953.

In the said suit, an application for rejection of the plaint was filed by the respondents which has been allowed by the learned trial Judge and affirmed by the High Court by reason of the impugned judgment.

11. Mr. S.N. Bhat, learned counsel appearing on behalf of the appellants, inter alia would submit that as in the preliminary decree passed in OS No. 15 of 1953 only the share of Ramusa, plaintiff therein, namely, his 2/9th share, which was amended as 1/4th share, was declared and furthermore in view of the fact that no decree was passed in the final decree proceedings, the suit for partition was maintainable.

The subject matter of the said suit, it was urged, was three houses and the properties which have been alienated. Whereas the house properties are said to have been divided, the alienated properties were not, as would appear from the order dated 11.06.1955 and in that view of the matter, the impugned judgments cannot be sustained.

Mr. P.R. Ramasesh, learned counsel adopted the submission of Mr. Bhat.

12. Mr. G.C. Bharuka, and Mr. R. Venkataramani, learned senior counsel appearing on behalf of the respondents, on the other hand, would submit:

(i) After passing of the preliminary decree, no property was available for partition. The properties were possessed by the co-sharers independently in accordance with the respective shares held by the co-sharer.

(ii) There had been a division of the joint family properties by metes and bounds resulting in complete severance of status, which having been admitted in the plaint, no cause of action survives for grant of a decree for partition.

(iii) Defendant No. 3 Chikka Chinnusa, who remained ex-parte, unsuccessfully tried to reopen the proceedings and obtained an order of injunction pursuant to the sale effected by the court in execution of a decree passed against him, but, in the year 1967, the said proceedings were dropped and thus, he is bound thereby.

(iv) As would appear from the order dated 3.09.1974, severance of joint status being not vitiated by any fraud, which has resulted in complete division of the properties should not be permitted to be reopened at this stage.

(v) In any event, sale deeds having been executed by the co-sharers from the years 1954 to 1956 and their validity having not been assailed directly, the same cannot be done in an indirect manner, the suit for partition is not maintainable.

(vi) In a proceeding under Order VII, Rule 11(d) of the Code, the court would be entitled to look into the documents which have been annexed to the plaint and in that view of the matter, recitals made therein may also be looked into for the purpose of determining the question as to whether there had been a complete severance of joint status.

(vii) As none of the properties are available in an original undivided condition, the impugned order should not be interfered with.

13. Order VII, Rule 11 of the Code provides for rejection of plaint, clause

(d) whereof specifies "where the suit appears from the statement in the plaint to be barred by any law".

14. The learned Trial Judge as also the High Court proceeded to pass the impugned order relying on or on the basis of the preliminary decree dated 20.03.1963 and the appellate orders. The High Court opined that the conclusion of the learned Trial Judge directing rejection of plaint was correct having regard to the provisions contained in Section 12 of the Code read with Order II, Rule 2 thereof. It was held that no cause of action was disclosed in the suit.

15. Order VII, Rule 11(d) of the Code has limited application. It must be shown that the suit is barred under any law. Such a conclusion must be drawn from the averments made in the plaint. Different clauses in Order VII, Rule 11, in our opinion, should not be mixed up. Whereas in a given case, an application for rejection of the plaint may be filed on more than one ground specified in various sub-clauses thereof, a clear finding to that effect must be arrived at. What would be relevant for invoking clause (d) of Order VII, Rule 11 of the Code is the averments made in the plaint. For that purpose, there cannot be any addition or subtraction. Absence of jurisdiction on the part of a court can be invoked at different stages and under different provisions of the Code. Order VII, Rule 11 of the Code is one, Order XIV, Rule 2 is another.

16. For the purpose of invoking Order VII, Rule 11(d) of the Code, no amount of evidence can be looked into. The issues on merit of the matter which may arise between the parties would not be within the realm of the court at that stage. All issues shall not be the subject matter of an order under the said provision.

The principles of res judicata, when attracted, would bar another suit in view of Section 12 of the Code. The question involving a 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 is one thing to say that the averments made in the plaint on their face discloses no cause of action, but it is another thing to say that although the same discloses a cause of action, the same is barred by a law.

The decisions rendered by this Court as also by various High Courts are not uniform in this behalf. But, then the broad principle which can be culled out therefrom is that the court at that stage would not consider any evidence or enter into a disputed question of fact of law. In the event, the jurisdiction of the court is found to be barred by any law, meaning thereby, the subject matter thereof, the application for registration of plaint should be entertained.

17. The preliminary decree which was passed in OS No. 15 of 1953 reads as under:

> "Its order and decree except against defendant No. 5 and 6 declaring the plaintiffs right to 2/9th share in the entire joint family properties. There shall be equitable division by metes and bounds of the plaintiff 2/9th share. The defendant No. 1 to 4 and 8 and 7 to deliver the plaintiff possession of 2/9th share in the said properties. 3rd defendant shall render proper accounts for the declaration of profits and rents made by him on enquiry require under order 20 rule XII regarding future amounts profits "

18. The said decree, however, was amended on 27.02.1963, as would appear from the order dated 07.06.1967, to which we have adverted to heretobefore.

19. It is, however, beyond any doubt or dispute that a final decree proceedings was initiated. An Advocate-Commissioner was appointed. Directions were issued therein from time to time. But, indisputably, there had been no partition by metes and bounds. The landed property was not partitioned. In its order dated 20.03.1963, the court noticed that separate sale deeds were executed by the defendants but despite the same, an order of injunction was passed to the following effect:

> "1) They should not remove the earth for the purpose of making bricks; and
>
> 2) They should not construct anything, on the suit property. I.A. 22 is allowed. No order as to costs."

20. The final decree proceedings were ultimately dropped by an order dated 3.09.1974. Neither the Trial Court nor the High Court had taken into consideration the effect and purport thereof. In the aforementioned context, the plaint filed by the appellants herein whether deserved outright rejection is the question.

21. Dr. Bharuka and Mr. Venkataramani have taken great pains to read the entire plaint before us as well as a large number of documents to contend that no cause of action was disclosed and in any event, the suit was barred by the principle of res judicata.

The other limbs of arguments which have been advanced before us, viz., keeping in view the deeds of sale executed by the respondents and the court auction sale which had taken place in respect of the appellants' share, had not been raised before the learned Trial Judge.

We may proceed on the assumption that the shares of the parties were defined. There was a partition amongst the parties in the sense that they could transfer their undivided share. What would, however, be the effect of a partition suit which had not been taken to its logical conclusion by getting the properties partitioned by metes and bounds is a question which, in our opinion, cannot be gone into in a proceeding under Order VII, Rule 11(d) of the Code. Whether any property is available for partition is itself a question of fact.

Whether the suit would be maintainable, if the plaintiff had not questioned the validity of deeds of sale, is not the question which can be answered by us at this stage.

The only contention raised before the learned Trial Judge was the applicability of the principles of res judicata. Even for the said purpose, questions of fact cannot be gone into. What can only be seen are the averments made in the plaint. What inter alia would be relevant is as to whether for the said purpose the properties were sold by reason of any arrangement entered into by and between the parties out of court; whether they had accepted the partition or whether separate possession preceded the actual sale; or whether the contention that a presumption must be drawn that for all practical purposes the parties were in separate possession, are again matters which would not fall for consideration of the court at this stage.

22. The plaintiff appellant might not have prayed for any decree for setting aside the deeds of sale but they have raised a legal plea that by reason thereof the rights of the co-parceners have not been taken away. Their status might not be of the coparceners, after the preliminary decree for partition was passed but as we have indicated hereinbefore the same cannot be a subject matter of consideration in terms of Order VII, Rule 11(d) of the Code.

23. One of the grounds taken in the counter affidavit of the respondent Nos. 10, 11, 13 and 17 under Order VII, Rule 11(d) of the Code is as under:

> "16. So far as item No. 8 of the Schedule A, the subsequent purchases have made flats and 80% have been sold to third party and the third- party interest have been created and third parties are not made parties before the Court. Hence, the suit is bad in law for misjoinder and non-joinder of necessary parties. Moreover, third parties interest has been created and separate khatas have been issued."

24. What would be its effect is again a question which cannot fall for determination under Order VII, Rule 11(d) of the Code. These facts require adjudication. The identity of the properties which were the subject matter of the earlier suit vis-`-vis the properties which were subsequently acquired and the effect thereof is beyond the purview of Order VII, Rule 11(d) of the Code.

25. Whether the properties mentioned in the plaint are available for partition is essentially a question of fact. Whether an order of injunction was obtained on the basis of a misleading statement in the earlier suit or whether they were entitled therefor are not the questions which, in our opinion, can be gone into at this stage. Moreover, it is contended that some lands have been acquired by the Bangalore Development Authority. But, we do not know in whose favour the awards were made and even if somebody has received the awarded amount, what would be the effect thereof.

We may place on record that the plaintiffs are said to be guilty of suppression of facts, as would appear from para 2 of the application filed under Order VII, Rule 11(d) of the Code, but then what would be the effect of such suppression has to be determined. [See S.P. Chengalvaraya Naidu (dead) by L.Rs. v. Jagannath (dead) by L.Rs. and others, AIR 1994 SC 853] What would be the effect of non-availability of the property vis-`-vis the contentions of the respondents in regard to Item No. 8 is a question which requires further probe.

26. Order VII Rule 11(d) of the Code serves a broad purpose as has been noted in Liverpool & London S.P. & I Association Ltd. v. M.V. Sea Success I & Anr. [(2004) 9 SCC 512] in the following terms:

> " The idea underlying Order 7 Rule 11(a) is that when no cause of action is disclosed, the courts will not unnecessarily protract the hearing of a suit. Having regard to the changes in the legislative policy as adumbrated by the amendments carried out in the Code of Civil Procedure, the courts would interpret the provisions in such a manner so as to save expenses, achieve expedition and avoid the court's resources being used up on cases which will serve no useful purpose. A litigation which in the opinion of

> the court is doomed to fail would not further be allowed to be used as a device to harass a litigant. [See Azhar Hussain v. Rajiv Gandhi (1986) Supp SCC 315" at pp. 324-35]"

But therein itself, it was held:

> "Whether a plaint discloses a cause of action or not is essentially a question of fact. But whether it does or does not must be found out from reading the plaint itself. For the said purpose the averments made in the plaint in their entirety must be held to be correct. The test is as to whether if the averments made in the plaint are taken to be correct in their entirety, a decree would be passed."

In C. Natrajan v. Ashim Bai & Anr. [2007 (12) SCALE 163], this Court held:

> "An application for rejection of the plaint can be filed if the allegations made in the plaint even if given face value and taken to be correct in their entirety appear to be barred by any law. The question as to whether a suit is barred by limitation or not would, therefore, depend upon the facts and circumstances of each case. For the said purpose, only the averments made in the plaint are relevant. At this stage, the court would not be entitled to consider the case of the defence. {See [Popat and Kotecha Property v. State Bank of India Staff Association [(2005) 7 SCC 510]}"

27. Dr. Bharuka as also Mr. Venkataramani have relied upon a large number of decisions. We do not say that they are wholly irrelevant but what we intend to say is they are not relevant for our purpose at this stage. Relevance of the said decisions must be noticed by the court at an appropriate stage. If we make any comment thereupon, the same may affect the rights of the parties at a later stage. We, therefore, refrain from doing so.

28. We may, however, notice only a few decisions of this Court.

In Popat and Kotecha Property v. State Bank of India Staff Association [(2005) 7 SCC 510], the question which arose for consideration was as to whether the suit was barred by limitation.

It was held:

> "22. There is distinction between "material facts" and "particulars". The words "material facts" show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad. The distinction which has been made between "material facts" and "particulars" was brought by Scott, L.J. in Bruce v. Odhams Press Ltd.
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> 23. Rule 11 of Order 7 lays down an independent remedy made available to the defendant to challenge the maintainability of the suit itself, irrespective of his right to

> contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word "shall" is used clearly implying thereby that it casts a duty on the court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13."

This Court opined that therein questions of fact were to be determined.

The matter, however, was referred to a Three-Judge Bench of this Court in Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and Others [(2006) 5 SCC 662]. However, as no conflict of decisions of this Court was found, it was referred back to the Two-Judge Bench again. A Two-Judge Bench of this Court in Balasaria Construction (P) Ltd. v. Hanuman Seva Trust and Others [(2006) 5 SCC 658] held:

> "8. After hearing counsel for the parties, going through the plaint, application under Order 7 Rule 11(d) CPC and the judgments of the trial court and the High Court, we are of the opinion that the present suit could not be dismissed as barred by limitation without proper pleadings, framing of an issue of limitation and taking of evidence. Question of limitation is a mixed question of law and fact. Ex facie in the present case on the reading of the plaint it cannot be held that the suit is barred by time. The findings recorded by the High Court touching upon the merits of the dispute are set aside but the conclusion arrived at by the High Court is affirmed. We agree with the view taken by the trial court that a plaint cannot be rejected under Order 7 Rule 11(d) of the Code of Civil Procedure."

29. Reliance has been placed on Tara Pada Ray v. Shyama Pada Ray and others [AIR 1952 Calcutta 579] wherein the averments made in the deed of sale had been taken into consideration. Therein, however, the Calcutta High Court noticed that the final decree proceedings need not be resorted to where the directions contained in a preliminary decree had been acted upon by the parties. Even such a question is required to be gone into.

30. Reliance has also been placed on T. Arivandandam v. T.V. Satyapal and Another [(1977) 4 SCC 467], wherein it has been held:

> "5. We have not the slightest hesitation in condemning the petitioner for the gross abuse of the process of the court repeatedly and unrepentently resorted to. From the statement of the facts found in the judgment of the High Court, it is perfectly plain that the suit now pending before the First Munsif's Court, Bangalore, is a flagrant misuse of the mercies of the law in receiving plaints. The learned Munsif must remember that if on a meaningful not formal reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should

> exercise his power under Order 7, Rule 11 CPC taking care to see that the ground mentioned therein is fulfilled. And, if clever drafting has created the illusion of a cause of action, nip it in the bud at the first hearing by examining the party searchingly under Order 10, CPC. An activist Judge is the answer to irresponsible law suits. The trial courts would insist imperatively on examining the party at the first hearing so that bogus litigation can be shot down at the earliest stage. The Penal Code is also resourceful enough to meet such men, (Cr. XI) and must be triggered against them. In this case, the learned Judge to his cost realised what George Bernard Shaw remarked on the assassination of Mahatma Gandhi:
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> "It is dangerous to be too good."

Each case, however, must be considered on its own facts.

31. Mr. Venkataramani has also placed reliance upon a decision of this Court in M/s Kalloomal Tapeswari Prasad (HUF), Kanpur v. Commissioner of Income Tax, Kanpur [(1982) 1 SCC 447] to contend that even partial partition is permissible. No exception thereto can be taken but the effect thereof vis-`-vis another suit, it is trite, cannot be determined under Order VII, Rule 11 of the Code.

32. We may, however, notice that in Kashinathsa Yamosa Kabadi, etc. v. Narsingsa Bhaskarsa Kabadi, etc. [AIR 1961 SC 1077], this Court stated the law, thus:

> "26. To sum up: on a consideration of the materials placed before the court, the reference to Panchas is proved to be made voluntarily by all the parties, that the Panchas had in the first instance decided that each branch was to get a fourth share in the properties and that decision was accepted by the parties, that division of properties made from time to time was also accepted by the parties, and subsequently, when the Panchas were unable to proceed with the division, the matter was referred by consent of the parties to Godkhindi and Godkhindi divided with the consent of the parties the outstandings, but he was unable to divide the remaining properties. For reasons we have already stated, the division made by the Panchas and by Godkhindi is binding upon the parties. Such properties as are not partitioned must, of course, be ordered to be divided and the division will be made consistently with the rules of Hindu Law. To the division of such properties which have not been divided, the decision of the Panchas dated 23- 9-1946, will not apply."

32. For the reasons aforementioned, the impugned order cannot be sustained. The appeal is allowed. We, however, must make it clear that the parties would be at liberty to raise all contentions before the learned Trial Judge at appropriate stage (s). The parties shall, in the facts and circumstances of the case, bear their own costs of this appeal.