

KAMS300043752022



**IN THE COURT OF THE ADDITIONAL SENIOR
CIVIL JUDGE AND JMFC, HUNSUR**

Present: Smt. Zaibunnisa, B.Com., LL.B.,
Addl. Senior Civil Judge & JMFC
Hunsur

Dated, this the 29th day of August, 2023

O.S.No.183/2022

Plaintiff : Sannappanayaka

V/s

Defendants : Smt. Subbamma and others

IA NO.II

Applicant : Marinayaka defendant No.6

V/s

Defendants : Sannappanayaka

Provision of IAs filed	:	IA II U/O 7 Rule 11(a) & (d) of CPC
Relief sought		Rejection of plaint
Date of filing IA	:	27-01-2023
Number of IA		IA No.II
Date of objection filed by the plaintiff	:	30-5-2023
Date on which the order passed on the application	:	29.08.2023

ORDERS ON IA-II FILED U/O 7 RULE 11(a) & (d) OF CPC

The defendant No.6 has filed above the application and sought for rejection of plaint as it is not maintainable for the reasons assigned in his affidavit accompanying the application.

In the affidavit sworn on behalf of himself and other defendants, the defendant No.6 contends that the plaintiff had filed the suit against these defendants for the relief of partition and separate possession in OS No.129/2019 but the said suit was came to be dismissed for non prosecution on 11.02.2021 due to the plaintiff's negligence. Later the plaintiff had moved a petition for restoration of his said suit in C.Misc.5/2021 before this court to and the said petition is also dismissed on 21.04.2022. After the dismissal of said case, the plaintiff has not filed any appeal. Now the plaintiff has come up with the suit concealing the fact of dismissal of his C.Misc.5/2021 and overturning the orders passed thereon. In the said court plaintiff dragged over these defendants for about 2 years and also wasted the precious time of the court. Under these circumstances the suit for Partition filed again without disclosing a cause of action is hopelessly barred and plaint is liable to the rejected. On the above stated facts and circumstances, defendants prayed to allow the application and to reject the plaint.

2. This application is resisted by the plaintiff. He stated that the suit filed by the plaintiff in OS No.129/2019, was dismissed for non prosecution but not on merits. The suit for partition can be filed. All the defendants in this suit have filed a false statement before this court with an intention to deprive the plaintiffs' share illegally. The application is filed only drag on the proceeding. Therefore, plaintiffs prayed for dismissal of the application with cost.

3. I have heard the learned counsel for the plaintiffs and defendant No.2 and 9 and perused the records on materials as well as the citations furnished by both the parties.

4. Points that arise for consideration of the court are:

1. Whether the IA No.XI filed U/O 7 Rule 11(d) of CPC by defendants No. 2 & 9 deserve to be allowed?
2. What order?

5. Findings of this court on the above points are:

Point No.1: In the Affirmative

Point No.2: as per final order for the following:

R E A S O N S

6. **Point No.1 :-** As could be seen from the plaint averments it is admitted that the plaintiff has filed the suit for partition against his mother and other siblings seeking partition and separate of his legitimate share. It is also narrated that the plaintiff had filed a suit against the defendants in O.S.No.129/2019 and same was dismissed for default. Now defendants on the basis of the said particulars filed the application to reject the plaint as there is no cause of action and also that the suit is also barred by law.

7. On the other hand, the plaintiff has opposed the application and also relied on a citation : (1993) 1 MLJ 60 passed in a case between Baliah Nadar And Anr. Vs Rayappan And Ors. On 10 January, 1992 by Hon'ble Madras High Court wherein at para No.4 that, "there is no substance in the argument that the suits are barred by the principles of res-judicata. O.S.No. 233 of 1971 was a suit for partition which was dismissed for default. There was no decision on merits. Hence, the principles of res-judicata will not apply. If the parties are co-sharers, then they are entitled to maintain a suit for partition so long as there is no

division. Just because an earlier suit for partition is dismissed for default without a decision of the Court that the plaintiff is not entitled to a share in the properties, the plaintiff will not cease to be a co-sharer. Hence, a second suit is maintainable as the cause of action is a continuing one”.

8. Before going through the merits of the application it is necessary to go through the provisions of Order VII Rule 11(a) and (d) of the Code. According to these sub rules a plaint shall be rejected where, it does not disclose a cause of action or the suit appears from the statement in the plaint to be barred by any law. It is a settled law that the Order 7 Rule 11 (d) CPC applies only where the statement as made in the plaint without any doubt or dispute shows that the suit is barred by any law in force. It does not apply in case of any disputed question. The pleas taken by the defendant in the written statement and application for rejection of the plaint on the merits, would be irrelevant, and cannot be adverted to, or taken into consideration, however the court can look into the documents referred to in the plaint . In other words, when the court is called upon to exercise jurisdiction to reject the plaint under Order VII Rule 11 of CPC, the averments made in the plaint and the documents filed along with the plaint, which form

part thereof alone will be taken into consideration and the court cannot consider the defense, pleas or materials submitted by the defendant for the purpose of rejecting the plaint.

9. When we come to the facts of the case on hand; here the defendants have stated only that the plaintiff has already filed a suit in O.S.No.129/2019 and same was dismissed for non prosecution and his petition for restoration in C.Mis.No.5/2021 also dismissed on merits, hence, the present suit is not maintainable and plaint is to be rejected. However, it is a settled law that a suit for partition cannot be dismissed for default. If a court has not decided a partition matter on its merits, any party can file a new suit for partition. If a suit is dismissed, the plaintiff can either file a new suit or apply to set aside the dismissal. A suit for partition dismissed for default does not bar a subsequent suit for partition. However, a fresh suit based on the same cause of action is barred. So far, the suit for partition or suit for redemption is concerned it is axiomatic that, when the plaintiff withdraws his suit, he will be entitled to file a fresh suit as the cause of action is a recurring cause of action. This is what held in catena of decisions of Hon'ble Supreme Court and also our Hon'ble High Court so also on the same principle the Hon'ble Madras High

Court rendered the decision supra that is relied on by the plaintiff here.

10. It is also relevant to reiterate the settled law that the plaint as a whole alone can be rejected under Order VII, Rule 11. In that view of the matter, the right of share of plaintiff or otherwise would be decided after conclusion of the trial. It is an undisputed fact that the suit is for partition and plaintiffs can maintain the suit against other defendants since, more number of properties are there and suit involved many other issues which need to be tried during the trial. As such, at this juncture, no grounds are made out to reject the plaint as sought for. Consequently, the following :

O R D E R

The I.A.No.II filed by the defendants
U/O 7 Rule 11(a) & (d) of CPC is hereby
rejected.

No order as to cost.

(Dictated to the Stenographer directly on
computer, typed by her, revised, corrected and then
pronounced by me in the open Court on this the 29th
day of August, 2023)

Addl. Senior Civil Judge & JMFC
Hunsur.