

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

R

DATED THIS THE 26TH DAY OF JULY, 2024

PRESENT

THE HON'BLE MR JUSTICE V KAMESWAR RAO

AND

THE HON'BLE MR JUSTICE C M JOSHI

RFA NO. 946 OF 2018 (PAR)

BETWEEN:

1. SRI. SRINIVAS
SON OF SRI. CHIKKAMUNIYAPPA,
AGED ABOUT 68 YEARS,
2. SRI. NARAYANA,
SON OF SRI. CHIKKAMUNIYAPPA,
AGED ABOUT 66 YEARS,
3. SRI. KRISHNAPPA,
SON OF SRI. CHIKKAMUNIYAPPA,
AGED ABOUT 64 YEARS,
4. SRI. RAMANNA,
SON OF SRI. CHIKKAMUNIYAPPA,
AGED ABOUT 62 YEARS,
5. SRI. GOVINDAPPA,
SON OF SRI. CHIKKAMUNIYAPPA,
AGED ABOUT 60 YEARS,

APPELLANT NOS.1 TO 5 ARE RESIDING AT:
MALLIAYAPPANAHALLI VILLAGE,
VEMGAL HOBLI,
KOLAR TALUK – 563 122.

6. SMT. JAYAMMA,
WIFE OF SRI. RAMANNA,
DAUGHTER OF SRI. CHIKKAMUNIYAPPA,
AGED ABOUT 50 YEARS,
RESIDING AT:
KARANALA VILLAGE,
THOOBAGERE HOBLI,
DODDABALLAPUR TALUK,
BANGALORE RURAL DISTRICT – 562 103.

7. SMT. LAKSHMAMMA,
WIFE SRI. GOPALAPPA,
DAUGHTER OF SRI. CHIKKAMUNIYAPPA,
AGED ABOUT 45 YEARS,
RESIDING AT:
MADAPURA VILLAGE,
TEKAL HOBLI,
MALUR TALUK - 563 137.

...APPELLANTS

(BY SRI. S. SREEVATSA, SENIOR COUNSEL FOR
SRI. DEVENDRA GOWDA.R.R., ADVOCATE)

AND:

1. SRI. M.C. NARAYANASWAMY,
S/O. CHIKKAMUNIYAPPA,
AGED ABOUT 70 YEARS,
2. SMT. GIRIJAMMA,
WIFE OF SRI. VENKATESH,
AGED ABOUT 30 YEARS,

RESPONDENT NOS.1 & 2 ARE RESIDING AT:
MALLIAYAPPANAHALLI VILLAGE,
VEMGAL HOBLI,
KOLAR TALUK - 563 122.
3. SMT. MANJULA,
W/O. CHANDRAPPA,
D/O. M.C. NARAYANASWAMY
AGED ABOUT 36 YEARS,
R/AT DYAVANAHALLI VILLAGE,
VOKKALERY HOBLI,
KOLAR TALUK - 563 122.
4. SMT. SHANTHAMMA,
W/O. SRIRAMAREDDY,
D/O. M.C.NARAYANASWAMY,
AGED ABOUT 34 YEARS,
R/AT. VAYASKUR VILLAGE,
KAIWARA HOBLI,
CHINTAMANI - 563 125.
5. SMT. ROOPA,
W/O. BYREGOWDA,
D/O. M.C.NARAYANASWAMY,
AGED ABOUT 32 YEARS,
R/AT MACHANDAHALLI VILLAGE,

VEMGAL HOBLI,
KOLAR TALUK - 563 122.

6. SRI. B.K. SRINIVAS,
S/O. LATE KRISHNAPPA,
AGED ABOUT 46 YEARS,
R/AT BETTAKOTE VILLAGE,
CHENNARAYAPATNA HOBLI,
DEVANAHALLI TALUK,
BANGALORE RURAL DISTRICT - 562 110.
7. SRI. R.B. PURUSHOTHAM,
S/O. R.D. BUJAGENDRA GOWDA,
AGED ABOUT 42 YEARS,
8. SRI. R.B. VENKATE GOWDA,
S/O.R.D. BUJAGENDRA GOWDA,
AGED ABOUT 40 YEARS,

RESPONDENT NOS.7 AND 8 ARE
RESIDING AT:
REDDAHALLI VILLAGE,
CHENNARAYAPATNA HOBLI,
DEVANAHALLI TALUK,
BANGALORE RURAL DISTRICT - 562 110.

9. SRI. K.S. SRIRAMAIAH,
S/O LATE SONNAPPA,
AGED ABOUT 56 YEARS,
R/AT KALANAYAKANAHALLI VILLAGE,
JANGAMAKOTE HOBLI,
SIDLAGATTA TALUK,
CHIKKABALLAPURA DISTRICT- 562 101.
10. SMT. CHANDRAKALA,
W/O. SRI. K.S. KRISHNAPPA,
AGED ABOUT 46 YEARS,
R/AT KALANAYAKANAHALLI VILLAGE,
JANGAMAKOTE HOBLI,
SIDLAGATTA TALUK,
CHIKKABALLAPURA DISTRICT - 562 101.

11. SRI. LIKITH,
S/O. KRISHNE GOWDA.Y.S,
AGED ABOUT 27 YEARS,
R/AT NO.12, 1ST MAIN AMBEDKAR LAYOUT,
K.B.SANDRA,
R.T. NAGAR POST,
BANGALORE - 560 032.

...RESPONDENTS

(BY SRI. HANUMANTHAPPA.B. HARAVI GOWDAR FOR
FOR R1 TO R5 (ABSENT),
SRI. SHARATH S.GOGI, ADVOCATE FOR R6 TO R11)

THIS APPEAL IS FILED UNDER ORDER 41 RULE 1 R/W
SEC. 96 OF CPC., AGAINST THE ORDER DATED 9.2.2018 PASSED
ON IA NO.IX IN OS NO.144/2014 ON THE FILE OF THE II ADDL.
SENIOR CIVIL JUDGE, KOLAR, ALLOWING THE IA NO.IX FILED
UNDER ORDER 7 RULE 11 R/W SEC.151 OF CPC.

THIS APPEAL HAVING BEEN HEARD AND RESERVED ON
10.06.2024, COMING ON FOR PRONOUNCEMENT OF JUDGMENT
THIS DAY, THE COURT DELIVERED THE FOLLOWING:

CORAM: THE HON'BLE MR JUSTICE V KAMESWAR RAO
AND
THE HON'BLE MR JUSTICE C M JOSHI

CAV JUDGMENT

(PER: THE HON'BLE MR JUSTICE V KAMESWAR RAO)

This appeal has been filed challenging the order
dated 09.02.2018 on I.A.No.IX filed by respondents No.6
to 10 herein under Order VII Rule 11 read with Section
151 of C.P.C., whereby the learned II Addl. Senior Civil
Judge and J.M.F.C., Kolar (hereinafter 'Trial Court') has
allowed the application by passing the following order:

"(a) I.A.No.IX filed by defendant No.6 to 10 U/O. 7 Rule 11 R/W.Sec.151 of CPC is allowed.

(b) The plaint is rejected U/O.7 Rule 11 (d) of CPC as the same is barred under the provisions of Order 9 Rule 9 of CPC.

(c) The plaintiffs are at liberty to seek restoration of O.S.No.534/2007 in Mis.petition No.42/2013.

(d) No order as to costs.

(e) Draw decree accordingly."

2. The facts as noted from the record are, it was the case of the appellants/plaintiffs in the suit being O.S.No.144/2014 that certain suit properties are ancestral/joint Hindu Undivided Family properties as the same were purchased by the original propositus Sri. Chikkamuniyappa, the father of appellants and respondent No.1. Late Chikkamuniyappa died intestate on 18.10.1994 leaving the appellants and respondent No.1 as his legal representatives to succeed to his estate including the suit properties. It was the case of the appellants that respondent No.1 had obtained registered sale deed dated 29.09.2006 from appellants No.1 to 5 (along with Akkamma W/o Late Chikkamuniyappa).

3. Appellants No.6, 7 and respondents No.3 to 5 had jointly filed a suit for partition in O.S.No.534/2007 before the Principal Civil Judge (Junior Division) at Kolar against respondent No.1 and also against the appellants No.1 to 5 and respondent No.9 herein. The said suit was dismissed for non-prosecution.

4. The appellants had filed the suit being O.S.No.144/2014 on the file of the Trial Court for the following reliefs:

"WHEREFORE, the plaintiffs humbly prays that this Hon'ble Court be pleased to pass the judgment and decree in favour of the plaintiffs and against the defendants in the following manner.

a) For a partition by metes and bounds to the Suit schedule properties and allot 7/8th share to the plaintiffs separately and independently and put the plaintiffs into separate possession of the said 7/8th share in the suit schedule properties.

b) To declare that the registered Release Deed dated: 29/9/2006 vide document No. 3421/2006-07 of Book I, stored in CD No. ALRD25, registered in the office of the Sub-Registrar, Kolar, obtained by the Defendant No.1 is void and not binding on the plaintiffs I so far as their 7/8th share in the schedule properties.

c) *To declare that the registered Sale Deed dated: 30/03/2007 vide document No. 6823/2006-07 of Book I, Stored in CD No. KLRD30, registered in the Office of the Sub-Registrar, Kolar, executed by the defendant No.1 in favour of the defendant No.6 in respect of 28 guntas of land (out of total extent of land measuring 1 acre 27 guntas, in Sy. No. 258/1 of Kurugal Village) and 2 acres 12 guntas of land (out of total extent of 7 acres 26 guntas of land in Sy.No. 258/2 of Kurugal Village) is void and not binding on the plaintiffs in so far as 7/8th share in the schedule properties.*

d) *To declare that the registered Sale Deed dated: 30/03/2007 vide document No. 6825/2006-07 of Book I, Stored in CD No. KLRD30, registered in the office of the Sub-Registrar, Kolar, executed by the defendant No.1 in favour the defendant No. 7 & 8 in respect of 25 guntas of land (out of total extent of land measuring 1 acre 27 guntas, in Sy. No. 258/1 of Kurugal village) and 2 acres 22 guntas of land (out of total extent of 7 acres 26 guntas of land in Sy.No. 258/2 of Kurugal Village) is void and not binding on the plaintiff in so far as their 7/8th share in the schedule properties.*

e) *To declare that the registered Sale Deed dated: 30/03/2007 vide document No. 6826/2006-07 of Book I, Stored in CD No. KLRD30, registered in the office of the Sub-Registrar, Kolar, executed by the defendant No. 1 in favour the defendant No.9 in respect of 14 guntas of land (out of total*

extent of land measuring 1 acre 27 guntas in Sy. No. 258/1 of Kurugal Village) and 1 acres 26 guntas of land (out of total extent of 7 acres 26 guntas of land in Sy. No. 258/2 of Kurugal Village) is void and not binding on the plaintiffs in so far as their 7/8th share in the schedule properties.

f) To declare that the registered Sale Deed dated: 30/03/2007 vide document No. 6828/2006-07 of Book I, Stored in CD No. KLRD30, registered in the office of the Sub-Registrar, Kolar, executed by the defendant No. 1 in favour the defendant No. 10 in respect of 35 guntas of land (in Sy. No. 297/3 of Kurugal Village) and 1 acres 06 guntas of land (out of total extent of 7 acres 26 guntas of land in Sy. No.258/2 of Kurugal Village) is void and not binding on the plaintiffs in so far as their 7/8th share in the schedule properties.

g) To pass an a order of permanent injunction restraining the defendant No. 6 to 10 from alienating the schedule property to any third parties either in the form of land or site/s.

h) To award costs of the suit.

i) And to pass such other order/s or relief/s as this Hon'ble Court deems fit to grant in the facts and circumstances of the case, including costs of the proceedings, in the interest of justice and equity.”

5. Along with the suit, the appellants had also filed an application I.A.No.1 under Order XXXIX Rules 1 and 2 of C.P.C. seeking restraint order against respondents No.6 to 10 from alienating and/or creating any encumbrances in respect of the suit schedule properties and the Trial Court on 19.04.2014, has passed an ad-interim order on I.A.No.1 directing respondents No.6 to 10 to maintain the present status of suit schedule properties without making any attempts to alienate the same in any manner to any persons till the next date of hearing. Later, the Trial Court on 03.09.2015, passed an order on I.A.No.1 dismissing the application filed under Order XXXIX Rules 1 and 2 of C.P.C.

6. The appellants being aggrieved by the order dated 03.09.2015 passed on I.A.No.1 in O.S.No.144/2014 by the Trial Court, had preferred a Miscellaneous Appeal in Mis.Appeal No.21/2015 on the file of II Addl. District and Sessions Judge, Kolar. The learned Judge on 12.04.2016, had dismissed the appeal filed by the appellants holding that the appellants had not produced the original documents along with the suit.

The appellants being aggrieved by the order dated 03.09.2015 passed in O.S.No.144/2014 and order dated 12.04.2016 in Misc.Appeal No.21/2015, had filed a Writ Petition before this Court being W.P.No.51425/2016 (GM-CPC) and the same is pending and under consideration.

7. It is stated by the appellants that respondents No.6 to 10 had filed an application I.A.No.IX under Order VII Rule 11 read with Section 151 of C.P.C. to reject the plaint on the ground that the same is barred by law. In the affidavit filed in support of the application, respondents No.6 to 10 relied upon the judgment passed by the Supreme Court in ***Prakash and Others -Vs.- Phulavati and Others [(2016) 2 SCC 36]***. The appellants had filed objections to I.A.No.IX in which, they have taken a stand that the citation relied upon by respondents No.6 to 10 is not applicable to the facts and circumstances of the case.

8. According to them, the Trial Court had committed error which is apparent as respondents No.6

to 10 had sought for rejection of the plaint by invoking the judgment passed in ***Prakash and Others -Vs.- Phulavati and Others*** (supra), which is on Section 6 of the Hindu Succession (Amendment) Act, 2005.

9. According to them, the Trial Court has erroneously rejected the plaint holding that when the earlier suit was dismissed for non-prosecution, then the plaintiffs/appellants have no authority to file a suit on same cause of action as per provisions of Order IX Rule 9 of C.P.C. and further holding that the plaintiffs/appellants have to proceed in Mis.Petition No.42/2013 requesting the Court to restore the earlier suit filed in O.S.No.534/2007.

10. According to Sri. Srivatsa, learned Senior Counsel for the appellants, insofar as suit for partition is concerned, there is no bar to bring a fresh suit notwithstanding the dismissal of previous suit for partition as held in ***Tara Kishore Das -Vs.- Beharu Barman and Others [AIR 1958 Assam 67]***. According to him, learned Trial Court had failed to

understand the fact that in the application I.A.No.IX filed by respondents No.6 to 10, they had not taken the ground with regard to alleged bar under Order IX Rule 9 of C.P.C. in view of dismissal of earlier suit in O.S.No.534/2007. Thus, the Trial Court ought not to have dismissed the suit holding that the same is barred under Order IX Rule 9 of C.P.C.

11. According to learned Senior Counsel, the Trial Court erred in holding that plaintiffs No.6 and 7 along with defendants/respondents No.1 to 5 had earlier filed a suit for partition and possession in O.S.No.534/2007 against defendant No.1, plaintiffs/appellants No.3 to 5 and defendant/respondent No.9 of the present suit. The Trial Court also erred to hold that the suit having been dismissed for non-prosecution on 13.10.2013, the appellants/plaintiffs have no right to file a fresh suit on the same cause of action. According to him, the suit in O.S.No.534/2007 was also filed by plaintiffs/appellants No.6 and 7. Apart from that, the suit in O.S.No.534/2007 was filed against defendants/respondents No.1 and 9. The other defendants in

O.S.No.144/2014 were not made parties. Hence, the Trial Court has gravely erred in coming to the conclusion that the plaintiffs have no right to file a fresh suit on the same cause of action.

12. Sri. Srivatsa would also state that the appellants/plaintiffs in O.S.No.144/2014 have contended that the cause of action arose in the month of October 2006 when plaintiffs No.6 and 7 have demanded defendant No.1 for partition and in the month of July 2013, when the plaintiffs came to know about the sale deeds dated 30.03.2007 executed in favour of defendants No.6 to 10 and also on 03.10.2013 the date on which O.S.No.534/2007 was dismissed for non-prosecution. Whereas in the earlier suit in O.S.No. 534/2007, the plaintiffs have contended that the cause of action arose in the month of October 2006 when they had demanded partition. In other words, the cause of action in both the suits is different.

13. According to him, even otherwise, the learned Trial Court failed to understand the fact that the cause of

action in respect of suit for partition is a continuous one and there is no bar for filing fresh suit either on same cause of action or on subsequent cause of action.

14. Sri. Srivatsa would also submit that the Trial Court failed to understand the fact that bar for bringing a fresh suit as enumerated in provisions of Order IX Rule 9 of C.P.C. is not applicable to a suit for partition. It is the liberty of the plaintiffs either to file a fresh suit or to seek recall/restoration of dismissal order passed under Order IX Rule 8 of C.P.C. Thus, the order passed by the Trial Court is erroneous and liable to be set aside.

15. On the other hand, learned counsel appearing for respondents No.6 to 10 would justify the impugned order by stating that learned Trial Court has rightly, on a finding that the appellants have filed the present suit on the same cause of action that was pleaded in O.S.No.534/2007, the same was barred in law. He contest the submissions made by the learned Senior Counsel for the appellants by stating that the provisions of Order IX Rule 9 of C.P.C. are also applicable to a suit

for partition when a suit has been dismissed for non-prosecution under Order IX Rule 8 of C.P.C. He states that the order of the Trial Court need not be interfered with when the Trial Court has given liberty to the appellants to move an application for restoration of O.S.No.534/2007. In support of his submissions, he has relied upon the judgment of the Madras High Court in ***Dr. S. Jayakumar and Another -Vs.- K. Kandasamy Gounder [2006-2-L.W. 259]***.

ANALYSIS:

16. Having heard the learned counsel for the parties and perused the record, the short question that arises for consideration is, whether the Trial Court is justified in allowing the application filed by respondents No.6 to 10 under Order VII Rule 11 of C.P.C. by holding that the second suit is barred by Order IX Rule 9 of C.P.C.?

17. In this regard, it is necessary to reproduce the provisions of Order IX Rule 8 of C.P.C. and Order IX Rule 9 of C.P.C. as under:

"8. Procedure where defendant only appears.— Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit.—(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

18. At the outset, we may state that the first suit being O.S.No.534/2007 was filed by appellants No.6 and

7 and respondents No.3 to 5 herein, in that sense, the appellants No.1 to 5 were not the plaintiffs in that suit. So, as O.S.No.534/2007 was not filed by appellants No.1 to 5 herein who were defendants No.3 to 7 in that suit, the said suit could not have been said to be dismissed for non-prosecution as is contemplated under Order IX Rule 8 of C.P.C. against the appellants. So, there was no occasion for appellants No.1 to 5 to pursue the application for restoration in O.S.No.534/2007.

19. So, in that sense, appellants No.1 to 5 could have filed the suit for partition, being O.S.No.144/2014.

20. Insofar as the appellants No.6 and 7 are concerned, it is true they were plaintiffs in O.S.No.534/2007, but they are not precluded from filing a fresh suit when the earlier suit filed by them was for partition simpliciter, unlike the suit O.S.No.144/2014 which is for larger reliefs including a challenge to the release deed(s) and sale deed(s).

21. In fact, the cause of action paragraphs in O.S.No.534/2007 and in O.S.No.144/2014 are the following:

O.S.No.534/2007:

"15. The cause of action for this suit arose on in the month of October 2006 and on all the further dates when the plaintiffs demanded for partition at Malliyapanahalli Village, Vemgal Hobli, Kolar Taluk, within the jurisdiction of this Hon'ble Court."

O.S.No.144/2014:

"19. The plaintiffs submits that, the cause of action for the suit arose in the month of October, 2006, when the plaintiff Nos.6 & 7 are demanded the defendant No. 1 for partition of the suit schedule properties, and in the month of July 2013 when the plaintiff Nos. 1 to 5 came to know about the sale deeds dated: 30/03/2007 executed by the defendant No. 1 in favour of the defendant No. 6 to 10 in respect of the suit schedule properties, on 3/10/2013 when the suit in O.S. No. 534/2007 filed by the plaintiff Nos. 6 & 7 (filed along with the defendant No. 3 to 5 herein), dismissed for non prosecution and all subsequent dates within the territorial jurisdiction of this Hon'ble Court."

22. It is clear from above that the cause of action of the second suit is not the same as of the first suit.

23. The law with regard to applicability of Order IX Rule 9 of C.P.C. in respect of partition suits is well settled. It has been held by the Himachal Pradesh High Court in the case of ***Asha Sharma and Others -Vs.- Amar Nath and Others [AIR 2003 Himachal Pradesh 32]*** that co-sharers' right to seek partition is a recurring cause of action, until and unless the partition between members of the joint family is effected, the joint owner can file a suit for partition until partition is actually effected irrespective of the fact whether earlier suit for such partition was dismissed for non-prosecution or the earlier decree for partition was not acted upon. It held that, right to seek partition is a substantive right.

24. Similarly, in the case of ***Madhura Gramani -Vs.- Thummala Sesa Reddi and Others [AIR 1926 Madras 1018]***, it is held by the Madras High Court that in a suit for partition, provisions contained under Order IX Rule 9 of C.P.C. would not be applicable. It is held as under:

"xx xx xx xx xx xx xx xx

... .. In the present case, when the suit of the plaintiff's assignee was dismissed in 1917 she was relegated to her right of possession as joint owner and consequently to her right to partition, a right which accrues from time to time, for this right had not been taken away by the prior litigation. It is not contended for the appellant that the question is *res judicata* and consequently the present suit which is based on the plaintiff's assignor's right of partition is not barred by O.9, Rule 9."

25. Similarly, in the case of **Tara Kishore Das** (supra) on which Mr. Srivatsa has relied upon, in paragraphs No.5 and 6 thereof, the Guwahati High Court has held as under:

"5. On the face of it, the decision of the learned Subordinate Judge is quite illegal. He appears to have ignored the position that a right to obtain partition is a right inherent in the joint ownership of property. It is a natural and legal incident of ownership which could not be denied to a co-owner of the property so long as his right subsists. The mere fact that on an earlier occasion he could not obtain partition, is no ground for holding that the right of the co-owner to seek partition is barred for ever. It is a continuing right which the co-owner possesses in the lands in question; and if on account of inconvenience or differences with the co-owner, it

is not possible for him to continue in joint ownership of the property, there is no reason why the right to seek partition should be denied to him.

6. In other words, it is open to the co-owner to ask for separate enjoyment of his share of the property at any time he likes and the right to partition the land cannot be refused so long as his interest in the land is not extinguished. The proposition is too well settled to need authorities. But I would refer to only a few of them. In T.C. Mukerji v. Afzal Beg ILR 37 All 155 : AIR 1915 All 1 (2) (A), it was pointed out that the right to bring a suit for partition, unlike other suits, is a continuing right incidental to the ownership of joint property and a second suit is, therefore, not barred. Another decision to which reference may also be made is Jagamohini Dasi v. Shiba Gopal Banerjee AIR 1920 Cal 108 (B), where it was again laid down that the right to sue for partition is a continuing right and incidental to the ownership of joint property: Therefore, so long as the property remains joint, one of the co-owners has a good cause of action for bringing a fresh suit for partition notwithstanding the dismissal of a previous suit for partition."

26. In **Ganesh Prasad -Vs.- Rajeshwar Prasad and Others [SLP(C) No.28377/2018]**, decided on 14.03.2023], the Supreme Court, in its latest opinion, in paragraphs No.60, 61 and 62, has held as under:

"xx xx xx xx xx xx xx xx

60. Thus, we may sum it up saying that Order IX Rule 9 of the CPC provides that when the suit is wholly or partially dismissed under Rule 8 (dismissed for default) the Plaintiffs shall be precluded from bringing in a fresh suit, in respect of the same cause of action. The present suit i.e., Suit No. 154 of 2009 filed in the Court of Civil Judge (J.D.) Eastern, District Ballia is not filed on the same cause of action. In the present suit, the case of the Plaintiffs as put up in the alternative is that the Defendant is in possession of the suit property as a mortgagee and they are ready to redeem the mortgage by making the necessary payment of the mortgaged amount and take back the possession. Whether the relief prayed for is time barred or not is for the trial court to decide on the basis of the evidence that the parties may lead. As observed by the Privy Council in Mohammad Khalil Khan (supra) if the evidence to support the two claims is different than the causes of action are also different. Hence, the contention raised on the basis of the provisions of Order IX Rule 9 of the CPC has no merits.

61. The matter may also be looked at from a different angle. Let us assume for the moment that in the first suit also the plaintiffs had prayed for a relief, seeking redemption of mortgage as prayed for in the present suit. Even in such circumstances, whether with both the reliefs identical in the two suits and the cause of action also the same, the

provisions of Order IX Rule 9 of the CPC would operate as a bar for the maintainability of the present suit. The right to redeem, is a right conferred upon the mortgagor by an enactment, of which he can only be deprived by means and in manner indicated for that purpose and strictly complied with. In Shridhar Sadba Powar v. Ganu Mahadu Kavade and others reported in ILR (1928) 52 Bom 111, a suit for redemption was filed but was dismissed under Order IX, Rule 8, of the CPC. The mortgagor brought a second suit for redemption and it was contended that it was barred under Order IX Rule 9 of the CPC. Marten, C.J. and Crump, J. rejected this plea. The learned judges relied on the previous decisions of the Bombay High Court including Ramachandra Kolaji Patil v. Hanmantha reported in ILR (1920) 44 Bom 939, and pointed out that the decision of the Privy Council in Thakur Shankar Baksh v. Dya Shankar and Others reported in (1887) LR 15 IA 66, was not against the view taken by them, as it was decided on a different state of law. In Vithal Rajaram Sutar and another v. Ramchandra Pandu Jadhav and others reported in AIR 1948 Bom 226, a Full Bench of the Bombay High Court held that the general terms of Order XXII Rule 9 of the CPC, which provided that where a suit abated or was dismissed under the Order, no fresh suit shall be brought on the same cause of action, cannot override the specific terms of Section 60 of the TP Act. It was pointed out that the CPC dealt

*with the procedure relating to all suits. There was a special law which dealt with the rights of mortgagors and mortgagees and that substantive law was to be found in the Transfer of Property Act. That substantive law provided only two ways in which the right of redemption can be extinguished and they were: (i) by act of the parties, or (ii) by decree of the court. The right of redemption is an incident of a subsisting mortgage and it subsists so long as the mortgage itself subsists. As held by the Privy Council in *Bhaiya Raghunath Singh and others v. Musammatt Hansraj Kunwar and others* reported in (1933-34) 61 IA 362, the right of redemption can be extinguished as provided in Section 60 of the Transfer of Property Act and when it is alleged to have been extinguished by a decree, the decree should run strictly in accordance with the form prescribed for the purpose. Unless the equity of redemption is so extinguished, a second suit for redemption by the mortgagor, if filed within the period of limitation, is not therefore barred.*

62. It follows, therefore, that if the right of redemption is not extinguished, the provision like Order IX Rule 9 of the CPC will not debar the mortgagor from filing a second suit because as in a partition suit, the cause of action in a redemption suit is a recurring one. The cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred, is a different one."

(emphasis supplied)

27. From the judgments referred to above, it is clear that if the reliefs sought in both the suits are different, then the causes of action are also different.

28. In a partition suit, a partition is not effected till such time the rights are determined. So, the cause for partition subsists till such time the partition is effected in the manner stated above. It is to be noted that a learned Single Judge of this Court in the case of **Smt. G.C.Sudha -Vs.- Smt. B.M.Parvathamma [R.F.A.No.972/2007 connected with R.S.A.No. 357/2015, decided on 06.04.2023]** has, in paragraphs No.53 to 58, held as under:

"53. In the light of this admitted position that the suit for partition filed by Lakshmi's grandfather on her behalf had been dismissed for non-prosecution, the reasoning of the Trial Court as affirmed by the Appellate Court that the dismissal of the earlier suit would preclude Lakshmi from filing another suit for partition cannot be sustained.

54. An argument is advanced that since the suit for partition filed by Lakshmi was dismissed for non-prosecution, by reason of Order IX Rule 9 of CPC,

Lakshmi should be precluded from filing a second suit.

55. Order IX Rule 9 of CPC, no doubt, precludes a plaintiff from bringing a fresh suit in the event the suit is dismissed for non-appearance of the plaintiff when the suit is called for hearing and the defendant is present. It is, however, to be stated here that the bar for filing a fresh suit would be in respect of a subsequent suit which is filed in respect of the same cause of action.

56. It has to be noticed here that the Apex Court in the case of GANESH PRASAD VS RAJESHWAR PRASAD AND OTHERS (Civil Appeal arising out of SLP (C) No 28377/2018 decided on 14.03.2023) has held as follows:

"It follows, therefore, that if the right of redemption is not extinguished, the provision like Order IX Rule 9 of the CPC will not debar the mortgagor from filing a second suit because as in a partition suit, the cause of action in a redemption suit is a recurring one. This cause of action in each successive action, until the right of redemption is extinguished or a suit for redemption is time barred is a different one."

57. In the light of this declaration of law, it is clear that the cause of action in a partition suit is a recurring action and the cause of action in each successive action would be a different one until the right has been adjudicated upon. Thus, Order IX Rule 9 of CPC would not be a bar for the filing of a second suit for partition.

58. Since, admittedly, Lakshmi had filed a suit for partition through her grandfather, the mere dismissal of the suit for non-prosecution would not attract the bar under Order IX Rule 9 of CPC for filing of a subsequent suit, fundamentally because, as stated by the Apex Court in the decision referred to supra, the cause of action for filing a partition suit is a recurring cause of action. The argument in this regard, therefore, is without any merit..”

29. So it is clear, like right of redemption, the right to seek partition is not extinguished till such time the right in the property is determined. As such, the cause of action in a partition suit is recurring one. Thus Order IX Rule 9 of C.P.C. would not be a bar for the second suit for partition. Even otherwise, the issue can be seen from another angle in as much as if the plaint could not be rejected against plaintiffs/appellants No.1 to 5, then the same cannot be rejected against plaintiffs/appellants No.6 and 7 though they were plaintiffs in O.S.No.534/2007 on the principle that a plaint cannot be rejected in-part. The Supreme Court in its latest opinion in ***Kum. Geetha D/o Late. Krishna and Others -Vs.- Nanjundaswamy and Others [Civil Appeal***

No.7413/2023, decided on 31.10.2023] has, held as under:

"11. The High Court committed an error by examining the merits of the matter. It pre-judged the truth, legality and validity of the sale deed under which the Defendants No. 4 to 14 claim title. This is not to say that the Plaintiffs have any less burden to prove their case or even that their case is probable. Simply put, the High Court could not have anticipated the truth of the averments by assuming that the alleged previous sale of the property is complete or that it has been acted upon. The approach adopted by the High Court is incorrect and contrary to the well-entrenched principles of considering an application under Order VII Rule 11, CPC. Under these circumstances, we set aside the judgment and the order passed by the High Court and dismiss the application under Order VII Rule 11, CPC, and restore the suit even with respect to properties mentioned under Schedule A of the Plaint.

12. There is yet another reason why the judgment of the High Court is not sustainable. In an application under Order VII Rule 11, CPC a plaint cannot be rejected in part. This principle is well established and has been continuously followed since the 1936 decision in Maqsd Ahmad v. Mathra Datt & Co.4. This principle is also explained in a recent decision of this Court in Sejal Glass Ltd. v. Navilan

Merchants (P) Ltd.,5 which was again followed in Madhav Prasad Aggarwal v. Axis Bank Ltd. The relevant portion of Madhav Prasad (supra) is extracted hereinunder:

"10. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) CPC cannot be pursued only in respect of one of the defendant(s). In other words, the plaint has to be rejected as a whole or not at all, in exercise of power under Order 7 Rule 11(d) CPC. Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in *Sejal Glass Ltd. [Sejal Glass Ltd. v. Navilan Merchants (P) Ltd., (2018) 11 SCC 780 : (2018) 5 SCC (Civ) 256]* is directly on the point. In that case, an application was filed by the defendant(s) under Order 7 Rule 11(d) CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the Director's Defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against Defendant 1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) CPC will have no application at all, and the suit as a whole must then proceed to trial.

...

12. Indubitably, the plaint can and must be rejected in exercise of powers under Order 7 Rule

11(d) CPC on account of non-compliance with mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaint, ascribable to clauses (a) to (f) of Rule 11 of Order 7 CPC. In other words, the plaint as presented must proceed as a whole or can be rejected as a whole but not in part..."

(emphasis supplied)"

30. So, from the above exposition of law, it is clear that if the plaint cannot be rejected against appellants No.1 to 5, the same could not have been rejected against appellants No.6 and 7.

31. We may state that the application filed by respondents No.6 to 10 under Order VII Rule 11 was on the following grounds:

- i) Plaintiffs have no right, title or interest over the suit schedule property as they claim share in joint family properties as coparceners in view of the judgment of the Supreme Court in ***Prakash and Others -Vs.- Phulavati and Others*** (supra).
- ii) The subject property has been alienated to a third-party and the subsequent purchasers are also necessary parties in the proceedings.
- iii) The plaintiffs never had any right title or interest over the suit schedule property.

- iv) Proper Court Fee has not been paid.
- v) There is no cause of action to file the suit.
- vi) The plaint is barred by law.

32. The above shows that the application was filed on the grounds other than the grounds on which the Trial Court has allowed it. The grounds on which the application was allowed were not even urged.

33. That apart, the Trial Court in the impugned order, has referred to the fact that respondents No.3 to 5, who were plaintiffs No.3 to 5 in O.S.No.534/2007, have filed an application seeking restoration of the said suit which is pending consideration. We say nothing on the same, as it is expected that that the Trial Court shall consider the application in accordance with law, including, noting the fact that appellants No.6 and 7 who were also the plaintiffs in that suit, have filed the suit being O.S.No.144/2014.

34. In view of our above discussion, the impugned order dated 09.02.2018 is clearly unsustainable and the same is set aside.

35. The suit is restored on the file of O.S.No.144/2014 pending before the II Addl. Senior Civil Judge and J.M.F.C., Kolar, who shall proceed to decide the suit in accordance with law.

No costs.

**Sd/-
(V KAMESWAR RAO)
JUDGE**

**Sd/-
(C M JOSHI)
JUDGE**

PA