

Laxmi and Others Vs. Seethamma and Others

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Court : Karnataka

Decided On : Apr-15-1994

Reported in : AIR1994Kant368; 1994(3)KarLJ19

Judge : N.D.V. Bhat and;A.B. Mugod, JJ.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 151 - Order 6, Rule 17 - Order 23, Rule 1(4) - Rules 1 to 14; Madras Aliyasanthana Act, 1948 - Sections 3 and 37A; Madras Aliyasanthana Act, 1949

Appeal No. : Regular Second Appeal No. 736 of 1982

Appellant : Laxmi and Others

Respondent : Seethamma and Others

Advocate for Def. : A. Keshava Bhat and ;P. Vishwanatha Shetty, Sr. Counsels

Advocate for Pet/Ap. : S.Shekhar Shetty and ;Ravivarma Kumar, Advs.

Judgement :

ORDER

N.D.V. Bhat, J.

1. This second appeal is preferred against the judgment and decree dated 20-4-1982 passed by the Civil Judge, Puttur in R.A. No. 13/1979. By the said judgment,

the learned Civil Judge set aside the judgment and decree dated 15-1-1971 passed by the Principal Munsiff, Puttur in O.S. No. 469/1968. The learned Principal Munsiff by the said judgment had dismissed the suit of the plaintiff-respondent 1 Seethamma. This second appeal has been referred to the Division Bench by an order dated 29-8-1991 passed by the learned single Judge of this Court.

2. The facts relevant for the disposal of this appeal, briefly stated, are as under :

Plaintiff-Seethamma, defendants 8 to 10 and defendants 12 to 27 were the members of a family governed by the Aliyasanthana Law. There was a partition in their family during the year 1951. Ex. P1 is the copy of the registered partition deed dated 19-1-1951. In the said partition, the properties described in various schedules of the partition deed were allotted to the members of the various kavarus. The suit 'A' schedule properties were allotted to one Kunhanna Rai. It is the case of the plaintiff that what was allotted to Kunhanna Rai was a life estate. As per the terms of Ex. P1 on the death of Kunhanna Rai, the properties would revert to the plaintiff, shares of 'C' and 'D' schedule properties. Kunhanna Rai died on 21-7-1955. On the death of Kunhanna Rai, defendants 1 to 7 took possession of the properties allotted to Kunhanna Rai. In fact, defendant 1 by a notice at Ex. P3 informed some of the members of the family that possession of the same was taken over. According to plaintiff, it is only plaintiff, defendants 8 to 10 and 12 to 27 who were entitled to the possession of the properties as per the terms of the partition deed. Defendant 12 -- Pakeerappa Rai, since deceased (represented by his L.Rs.) was the Yajman of the Kavaru to which plaintiff also belonged. He, therefore, filed O.S. No. 459/1960 in the Court of Munsiff, Puttur praying for the same reliefs which are prayed for in the suit, out of which, this appeal has arisen. The present plaintiff -- Seethamma was defendant 12 in the said suit at O.S. No. 459/60. The said suit, however, came to be dismissed as withdrawn in the basis of the endorsement made in the plaint by the said Pakeerappa Rai. In fact, the instant plaintiff resisted the withdrawal of the suit. She had even filed RIA No. 812/1962, praying for transposing her as plaintiff and to transpose the plaintiff as defendant. However, her petition in that behalf was dismissed. She approached this Court against the said order of dismissal of her RIA No. 812/1962 in C.R.P.

No. 1155/1962. However, her CRP was also dismissed by this Court with the following observations :

'It is not disputed that the order sought to be revised is a discretionary one. Nor can be contended that the right if any, of the petitioner to proceed independently of the matter is lost.'

It is in the context of this background plaintiff has chosen to file the present suit at O.S. No. 469/68 praying for a decree for possession of 'A' Schedule properties as also to direct defendants 1 to 7 to pay the plaintiff past mesne profits and other reliefs referred to in the plaint.

3. The suit of the plaintiff was resisted mainly by defendants 1 to 7. In sum, they contended that the suit of the plaintiff is not maintainable. Defendant 12 has also filed his written statement. Some other defendants also have put in their separate written statements. They are referred to in the course of the judgment of the learned Munsiff. The main thrust of the submission reflected in the written statement of the contesting defendants is that the suit is barred by the principles of res judicata as also by the provisions of O.23, R. 1(3), C.P.C. They also took up a contention that the properties allotted to Kunhanna Rai were not merely a life estate but they were allotted to him absolutely. They also contended that the suit is barred by time.

4. Defendant 12 by his written statement denied the allegations made in the plaint that there was any collusion between him and defendants 1 to 7 in the suit which he had filed and which he had already withdrawn later. However, he took up a contention that defendants 1 to 7 have no rights to be in possession of the properties and he continues to be the manager of the family. He prayed for allotment of 1/20th share in the plaint 'A' Schedule properties.

5. On the basis of the pleadings, the learned Munsif framed several issues which are reflected in the judgment dated 15-1-1971. The parties did not plead any oral evidence. However, certain documents appear to have been marked.

6. On the basis of the documentary evidence and the submissions made at the Bar, the learned Munsiff by his judgment dated 15-1-1971 dismissed the suit of the plaintiff. Being aggrieved by the same, plaintiff-respondent 1 preferred R.A. No. 58/1971 before the Principal Civil Judge, Mangalore, S.K. (since there was no Civil Judge's Court at Puttur at that time). The learned Civil Judge, by his judgment dated 19-8-1972 set aside the judgment of the learned Munsiff and remanded the matter for fresh disposal according to law.

7. Being aggrieved by the same, the aggrieved defendants preferred M.S. A. 94/72 before this Court. This Court by its judgment dated 18-4-1973 allowed the appeal in part by setting aside the order of remand passed by the learned Civil Judge and by directing him to restore the appeal on his file and to call for a finding from the trial Court on the issues framed by him and thereafter to dispose of the appeal in accordance with law. In furtherance of the said direction of this Court, the matter was remitted to the learned Munsiff, Puttur with a direction to give his findings on the concerned issues. The learned Principal Munsiff by his order dated 12-4-1976 recorded his findings on Issues 1 and 2 referred to him and returned the papers to the learned Civil Judge. The learned Civil Judge, Puttur (since in the meantime the appellate jurisdiction was transferred to the newly established Civil Judge's Court at Puttur), heard the appeal and by his judgment dated 20-4-1982 allowed the appeal and decreed the suit of the plaintiff by directing defendants 2 to 7 to deliver possession of plaint 'A' Schedule properties to the plaintiff in her capacity as the person representing her Kavaru consisting of herself and defendants 13 to 32 and the kayaru of defendants 8 to 10, as also for an enquiry under O.20, C.P.C. Hence the instant second appeal.

8. The learned single Judge of this Court was pleased to admit the appeal by his order dated 30-11-1982 and raised the following substantial questions of law for consideration, which read as under :

'(1) Whether the first appellate Court was justified in reversing the judgment and decree of the trial Court, without adequately meeting the reasons advanced by the trial Court?

(2) Whether the Courts below were justified in holding that the suit was not barred by time?

(3) Whether the Courts below were justified in holding that the suit was not barred in view of the decree in O.S. No. 459/1960 ?'

9. We may point out here that the typographical mistake in giving the correct number of the suit in substantial question No. 3 reflected in the order sheet dated 30-11-1982 is corrected hereinabove by giving the correct suit number.

10. We have heard the learned Counsel on either side.

11. On a perusal of the judgments of the two Courts below and in the light of substantial questions of law, the aspects relevant for consideration, having a bearing on the result of the case may be enumerated as under :

'1) Whether the property allotted to Kunhanna Rai was a life estate and if so whether it devolved on the kavaru of plaintiff and others as alleged in the plaint?

2) Whether the present suit is barred by time?

3) Whether the suit is barred by res judicata in view of the order in O.S. No. 459/1960?

4) Whether the suit in question is barred by the provisions of O. 23, ft. 1(4)(b), C.P.C. ?

3) Whether the plaintiff's suit is not maintainable in the context of the scheme of Madras Aliyanthana Act, 1949?

6) Whether improvements alleged by the defendants are established?

7) Whether the I Appellate Court has erred . in rejecting the application for amendment of written statement filed by the concerned defendants at I.A. No. III?'

12. In so far as the first aspect is concerned it is noticed that the two Courts below have held that Kunhanna Rai had only a life estate in the properties allotted in the partition and that the same devolved on the kavaru of plaintiff and others as

alleged in the plaint. This aspect is dealt with by the trial Court in para-20 of its judgment. The 1st Appellate Court has dealt with this aspect in para-18 of its judgment. On a careful perusal of the recitals reflected in the partition deed at Ex. P1 and the light of the discussion on this aspect by the two Courts below, we are indeed of the view that the findings of the two Courts below cannot be found fault with. In fact, Sri Shekhar Shetty, learned Counsel for the appellants has also not seriously disputed the findings of the two Courts below. At any rate, in the context of the recitals at Ex. P1, we have no hesitation whatsoever in reaching a conclusion that the findings of the two courts below on this aspect are well justified.

13. In so far as the second aspect is concerned, both the Courts below have taken the view that the suit is not barred by time. In fact, Sri Shekar Sheety, learned Counsel for the appellants submitted with reference to para-24 of the judgment of the 1st Appellate Court that he does not seriously dispute the findings on this aspect. Even otherwise, in the light of the decision in Srikanta Subbaraje Urs v. S. P. Sundaraja Char, (1972) 1 Mys LJ111, the suit should be deemed to have been presented on 29-9-1966 which date is within 12 years from the date of the alleged dispossession by defendants 1 to 7. Hence we agree with the findings of the two Courts below on this aspect.

14. The third aspect relates to the question of res judicata. It is noticed that the 1st Appellate Court has taken the view that the suit at O.S. No. 459/60 was not decided on merits but was dismissed for non-prosecution and that, therefore, the order therein would not operate as res judicata. The 1st Appellate Court has dealt with this aspect in para-20 of its judgment relying upon the decision of the Supreme Court referred to therein. The 1st Appellate Court has pointed out as to how the order passed by the learned Munsiff in O.S. No. 459/60 dismissing the suit for non-prosecution does not operate as res judicata. We are in complete agreement with the said reason. It is not necessary to dilate on this aspect. However, we hasten to add here that Sri Shekhar Shetty, learned Counsel for the appellants has argued that the present suit is barred by the principles of res judicata in view of the finding on Issue No. 7 in O.S. No. 132/63. The copy of the judgment in the said suit is produced at Ex. D.18. This is a point which was sought

to be raised before the 1st Appellate Court for the first time by defendants 2 to 6 by way of amending their written statement by an application for amendment at I.A. No. III. It is noticed that the 1st Appellate Court has rejected the application for amendment of the written statement for the reasons stated in para-29 of its judgment. We will deal with this question while considering the seventh aspect.

15. Now we will deal with the hotly contested aspects viz., 4th and 5th aspects enumerated hereinabove.

These aspects relate to the question as to whether the present suit is barred by the provisions of O. 23, R. 1(4)(b), C.P.C. and as to whether the same is not maintainable in the context of the scheme of Madras Aliyasanthana Act, 1949 (for short 'Madras Act').

16. It is not in dispute that the parties are governed by the Madras Act. The details of the main branches and the sub-branches are given in para No. 7 of the plaint. S. 3 of the Madras Act has defined the various terms like 'kavaru', 'kutumba', 'Nissantati kavaru', 'san-tati kavaru', 'Yajaman' etc. S. 3(i) defines 'Yajaman' as under :

"Yajaman' means the oldest member, male or female, of a kutumba of kavaru, as the case may be, in whom the right to manage its properties vests, or any other member or members, in whom such right is vested by family custom, contract, decree of court or otherwise.'

Chapter IV deals with intestate succession. Chapter V deals with 'Kutumba and its Management'. S. 32 thereunder deals with the right to remove yajaman by a suit. It reads as under :

'32(1). Any member of a kutumba may institute a suit in a Civil Court for the removal of the yajaman-

(i) for any malfeasance, misfeasance, breach of trust or neglect of duty in respect of the kutumba; or

(ii) for any misappropriation or improper dealing with the income or the properties of the kutumba; or

(iii) for unsoundness of mind or any physical or mental infirmity which unfits him for discharging the functions of a yajaman; or

(iv) for any other sufficient cause which, in the opinion of the Court, makes his continuance as yajaman injurious to the interests of the kutumba.

(2) A Court trying a suit under sub-section(1) may, if it considers that it is not necessary to direct the removal of the yajaman, pass such orders as it thinks fit having regard to the welfare of the kutumba and the circumstances of the case.'

Chapter VI deals with partition. The amendments are effected to certain Sections by Mysore Act No. 1/1962 and Karnataka Act No. 30/1978. In particular, S. 37A is introduced by Act No. 1/1962 enabling any male or female member of a kavaru having undivided interest in the properties of thekutumba to claim partition of his or her share in the properties of the kutumba or kavaru, as the case may be.

17. A careful perusal of the various provisions of the Madras Act would go to show that the 'Yajaman' of the Kutumba has got a pivotal role to play with reference to the property and the affairs of the 'kutumba'. It is also clear from the provisions that the 'Yajaman' as defined in S. 3(i) continues to be a 'Yajaman' unless he is removed from his office or unless he relinquishes his position by a registered document. He has got certain powers and certain obligations.

18. It is not in dispute that defendant 12 is the yajaman of plaintiff's kavaru (vide plaint para 8). He was the sole plaintiff in O.S. No. 459/60. The present plaintiff was defendant 12. The said suit at O.S. No. 459/60 was filed against defendants 1 to 7 for identical reliefs. The cause of action shown in the said plaint as disclosed in para 9 therein is on and from September, 1955 when Kunhanna Rai died and defendants 1 to 7 allegedly took illegal possession of the properties. It is also necessary to point out here that the cause of action shown in para 15 of the plaint in the present suit is identical. Para 15 of the plaint reads as under :

'The cause of action for this suit arose on and from 22-7-1955 when Kuhhanna Rai died and defendants 1 to 7 took illegal possession of the 'A' Schedule properties and at Keyyoor village Puttur taluk within the jurisdiction of this Court.'

The scheme of both the suits viz., O.S. No. 459/60 and the present suit (O.S. No. 469/68) would go to show that they are filed for and on behalf of the 'kutumba'.

19. We have alluded to the aforesaid details so as to enable us to appreciate the submissions made by the learned counsel on either side from a proper perspective.

20. As pointed out earlier in para 2 hereinabove, O.S. No. 459/60 was dismissed for non-prosecution on the basis of the endorsement made by the plaintiff in the said suit (defendant 12 in the present suit). The attempt made by the instant plaintiff Seethamma to get her transposed as plaintiff did not fructify. Her application at RIA. No. 812/1962 in that behalf was dismissed by the trial Court by its order dated 29-6-1962. The Civil Revision Petition preferred against the said order was dismissed by this Court. The observation made by this Court while dismissing the CRP is already culled out earlier at para 2 hereinabove.

21. It is in the context of the aforesaid details, this Court is required to examine the fourth and fifth aspects referred to in para No. 11. The fourth aspect relates to the bar pleaded under O. 23, R. 1(4)(b), CPC. The fifth aspect relates to the maintainability of the suit in the context of the scheme of the Madras Act.

22. O. 23, R. 1 reads as under :

'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 :

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court. (2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader,

by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(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 a 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 claim without the permission referred to in sub-rule (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) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.'

It is not in dispute that dismissal of O.S. 459/ 60 is covered by O. 23 R. 1, CPC. It is also not in dispute that permission to file a fresh suit on the same cause of action was not taken before getting the suit dismissed for non-prosecution. Ordinarily, therefore, if the plaintiff in the said suit had brought a suit by himself he would have been precluded from filing a fresh suit in view of O. 23, R. 1(4)(b), CPC.

23. Sri Keshava Bhat, learned Counsel for the plaintiff-respondents contended that the present plaintiff Seethamma was only a defendant in the said suit and that therefore, the provisions of O. 23, R. 1(4)(b), CPC in terms, does not apply. We do

not agree. There is no dispute that the said suit was filed by Pakeerappa Rai in his capacity as the 'yaja-man' representing the entire body of the members in the 'kutumba'. In fact, the present plaintiff who was defendant 12 in the said suit belongs to the same kavaru. That the said suit was filed for and on behalf of the family comprising of Pakeerappa Rai and defendants 8 to 10 and 12 to 26 in the said suit can also be spelt out from the totality of the allegations made in the plaint of the said suit. Under these circumstances, the result in the said suit would ordinarily bind all the members of the 'kutumba' of which Pakeerappa Rai plaintiff in O.S. No. 459/60 was the 'yajaman'. In this view of the matter, the submission of Sri Keshava Bhat that the present plaintiff Seethamma was only a defendant in the said suit and that therefore, the bar under O. 23, R. 1(4)(b), CPC would not apply to her, cannot be countenanced at all.

24. The learned Counsel Sri Keshava Bhat, however, contended that the bar under O.23, R. 1(4)(b), CPC would apply only if both the suits relate to the same subject-matter, the expression 'subject-matter' employed in the said provisions being understood as explained in the decisions pressed into service in this behalf. In this connection, the learned Counsel Sri Keshava Bhat has placed reliance on the decision in Vallabh Das v. Dr. Madan Lal : [1977]1SCR211 . In the context of the same, it is clear that before it can be said that the subject-matter in the two suits is the same, the cause of action and the reliefs claimed should be common to both the suits.

25. The legal proposition canvassed by Sri Keshava Bhat is correct. However, it is not possible to say on facts that the rights claimed in the suit and the cause of action are different. We have, earlier, set out in detail the cause of action referred to in the two plaints. The cause of action alleged in both the suits is the death of Kunhanna Rai and dispossession of plaintiff and the concerned defendants, by defendants 1 to 7. The reliefs claimed are practically the same. Under these circumstances we do not agree with (he learned Counsel for the respondents that the subject-matter of the two suits is not the same.

26. If that be so, it will have to be seen as to whether the observations made by this Court while dismissing C.R.P. No. 1155/ 1962 will have the effect of reserving

liberty to the present plaintiff Seethamma to file a suit like the one which is filed by her. The order of this Court in the said revision petition reads as under :

'It is not disputed that the order sought to be revised is a discretionary one. Nor can it be contended the right if any of the petitioner to proceed independently of the manner is lost.

The Civil Revision Petition is dismissed. No costs.'

The learned Munsiff, in his order while recording the findings on the issues referred to him by the Ist Appellate Court, has taken the view that the order of this Court in C.R.P. No. 1155/62 and culled out hereinabove, does not confer any special right in favour of the plaintiff, other than the rights, she has under law. On a careful perusal of the order of this Court in the aforesaid C.R.P., we are unable to read the conferment of any special right on the present plaintiff to file a suit on her own. All that this Court has said is that the right of plaintiff if any to proceed independently of the matter is not lost. In other words, if the plaintiff has got any right to proceed independently in the matter, the same cannot be said to have been lost by the order challenged in the said revision petition. If, therefore, the plaintiff has no independent right to proceed, the observation of this Court cannot come to the aid of the plaintiff to get rid of the bar under O. 23, R. 1(4)(b), CPC.

27. This leads us to the question as to whether in the context of the background of the case, plaintiff can be said to have a right to bring the suit like the one leading to this appeal. It is noticed that both the Courts have taken the view that the plaintiff has failed to establish that there was collusion between Pakeerappa Rai plaintiff in O.S. .No. 459/60 and defendants-1 to 7. This aspect is dealt with by the learned Munsiff in his order while recording his findings on the referred issues. The I Appellate Court has discussed this aspect under point No. 5. The discussion can be seen at para Nos. 21 and 22 of the judgment of the I Appellate Court. The fact that defendant-12 was the 'yajaman' and continued to be so even thereafter is not disputed. If that be so, whether it is permissible for a junior member of kutumba governed by Aliyasanthana Law to bring a fresh suit similar in nature is essential aspects, is the next question for consideration. At this juncture, it is significant to notice that plaintiff is not championing the cause of her individual right. She

purports to represent in the suit the entire body of her kavaru (including defendant-12) and defendants 8 to 10. In para 8 of her plaint, she has alleged as under :

'That the 12th defendant being the senior most member and de jure yajaman of plaintiff's kavaru and as well as the defendants 8 to 10 representing their kavaru are emitted to the possession of the 'A' schedule properties as well as past profits at least for the last 3 years as well as future profits also.'

Then again, at para 11, she has averred as follows :

'Since the eldest member of the plaintiffs branch is colluding with defendants 1 and 2 and is not prepared to take any steps for taking possession of the A-Schedule properties, the plaintiff who is the next seniormost member in her branch is constrained to file this suit for possession of A-schedule properties and for mesne profits past and future in the interest of her kavaru and also representing their kavaru. As the defendants 8 to 10 and 12 to 26 would not join as plaintiffs they are impleaded as defendants in the suit as they are also interested in the same and they too have a right in the A schedule properties. Since the 11th defendant is now a tenant in the properties under defendants 1 to 7 and since the plaintiff claims khas possession of A schedule properties he too is made a party to this suit, so that the matter may be decided in his very presence.'

28. It is therefore clear that plaintiff in the instant case is not enforcing any independent or individual right, but she is only trying to enforce the right of 'kutumba' of which she is a member. In our view, such a modus operandi does not appear to be permissible in the context of the scheme of the Madras Aliyasanthana Act, the details of which are referred to above. Even otherwise, we are of the view that if it is held that plaintiff is entitled to file a suit like the one in hand, the same is likely to lead to anomalous position. The anomaly would arise in this way. Plaintiff in O.S. No. 459/60 who was the yajaman of the family, obviously he was precluded from filing a fresh suit since he did not obtain permission to file a fresh suit under the relevant sub-rule of O. 23, K. 1, C.P.C. Though it is possible to say that on that count his right in the property cannot be said to have been lost, his remedy to enforce that right was certainly lost. In other words, if at all he had any

right left in the property which is in the hands of defendants 1 to 7, it was a right without remedy. It is also not possible to hold that the remedy which was not available to him at any rate in respect of his own share in the family property can be enforced by some other member of the family or kavaru to which he belongs. It is in this context, it is required to be seen as to whether plaintiff's suit in the present form is maintainable. As pointed out earlier, plaintiff has not filed a suit to enforce her own individual right in the family. She purports to enforce the rights of the entire family even including that of defendant 12 who was the plaintiff in O.S. No. 459/ 60. It is therefore clear that if it is held that plaintiff is entitled to file the suit in the present form, the same would indeed lead to conflicting situations and it is certainly not permissible for the court to allow such a situation.

29. It is necessary to point out here at this juncture, even at the risk of repetition, that it is a hard fact that plaintiff in O.S. 459/60 is allowed to abandon the said suit and defendant 12 in the said suit was not allowed to transpose herself as plaintiff. Sri Keshava Bhat, learned counsel for the contesting respondents contended that in the context of the provisions of O. 23, R. 1(5), CPC, as it stands after amendment, corresponding to O.23, R. 1(3), CPC as it stood before the 1976 amendment, it was not permissible for the Court to allow the plaintiff to abandon the suit. It is not necessary for us to go into that aspect because, the order dismissing O.S. No. 459/60 has become final. Once when that order-becomes final legal consequences flowing from the said position will operate. Similarly, the order on the application in R1A 812/62 which was confirmed by this Court in CRP 1155/72 has become final. The said order, therefore, which is binding on the present plaintiff will have its chain reaction. We have pointed out earlier as to how the observation made by this Court while dis-missing CRP. 1155/62 has not conferred any special right or reserved any liberty to file a suit otherwise than available to her under law. In other words, plaintiff's remedy, if any, to enforce the rights in respect of the properties in question is regulated by law and that is what is available to her. It is significant to notice here that this Court while dismissing her C.R.P. has not stated that the present plaintiff who was the revision petitioner could file a fresh suit on the same cause of action. If that was the intention of this Court, this Court would have said so. On the other hand, as pointed out earlier, all that this Court has said is that the right if any of the plaintiff to proceed to file a suit

cannot be said to have been lost. What would have happened had the plaintiff framed her suit in such a way as to enforce her own right in the property is another matter. Since, however, plaintiff has not brought such a suit. It is not necessary for us to express any opinion in that behalf. At any rate, having regard to the anomalous position or conflicting situations, which are likely to be brought about if the suit of the plaintiff in the present form is held to be maintainable, we have no hesitation to hold that plaintiff's suit suffers from an infirmity which goes to the root of the matter.

30. We may also point out here that plaintiff along with one Lingappa Rai had filed O.S. 132/63 in the Court of Munsiff, Puttur in which the present plaintiff was the second plaintiff. The said suit was filed praying for a decree declaring that the decree in O.S. No. 459/60 is against the 8th defendant (defendant 12 in the present suit) personally and not as yajaman of the family and as such is not binding on the family. However, the said suit was dismissed by the said Court and under Issue No. 6 therein, it is held, among other things, as under :

'The suit itself admittedly was filed by the 8th defendant in his capacity as yajaman. It is held in : AIR1950 Mad546 (Nagamma Shedthi v. Horathu Hengsu) which is a case under the Marna kathayam Law, that a decree obtained against a karnavan of a Malabar Tarwad of the Kartha of Aliyasanthana family cannot in the absence of fraud or collusion, be held not binding on the junior members on the ground of gross neglect or breach of duty on the part of the karnavan or kartha.'

In that view of the matter, the Court answered the said issue in the affirmative and it is noticed that the said suit was dismissed by the Court, as can be seen from para 33 of the said judgment which is produced at Ex. D.18.

31. In fact, the said judgment is marked as Ex.D.18 by the trial Court presumably by consent. We may point out here that no oral evidence was led by the parties. This judgment is referred to by the learned Munsiff particularly in the context of the issue as to whether there was any collusion between the plaintiff Pakeerappa Rai and defendants 1 to 7 in withdrawing the said suit by the plaintiff. In para 13 of his judgment, the teamed Munsiff has held as under :

'A few months after the disposal of O.S. 459/60 Bhagirathi filed a suit for partition of the family properties in O.S. 47/63 on the file of this Court. She contended that she was a major on the date of partition and she was treated as minor fraudulently and as such the partition deed is null and void. In that case, the present plaintiff filed a statement supporting the case of her daughter. Thereafter the present plaintiff and her Son-in-law filed another suit in O.S. 132/63 against the defendants. In that case the alleged collusion was the subject-matter of Issue No. 5. During the course of her examination before Court in O.S. 132/63 the present plaintiff stated that the non-prosecution of the suit by Pakeerappa Rai (8th defendant in that suit) was in the interest of the family. This shows that the plaintiff has conceded in the previous suit that the non-prosecution of the suit by the 12th defendant was in the interest of the family. In the above circumstances the contention of the plaintiff that the 12th defendant had no grounds to abandon the suit and that the non-prosecution of the suit was not beneficial to the family does not hold water. In view of the above evidence I hold that the non-prosecution of the suit in O.S. 459/60 by the 12th defendant was not on account of the collusion between him and the other defendants as alleged, but it was on account of the conduct of the members of his own branch family including the plaintiff.'

We have thought it necessary to refer to this aspect only to see as to whether the blame could be placed squarely at the doors of defendant-12 Pakeerappa Rai who was the plaintiff in O.S. 459/60 or whether plaintiff and other members of the kavaru had also contributed their own share in bringing about the situation in which they landed themselves.

32. Sri Keshava Bhat, learned Counsel for the contesting respondents contended that plaintiff's suit apart from anything else can be sustained in the context of the ratio of the decision in Shivangoudav. Gangawwa (1966) 2 Mys LJ 148 : (AIR 1967 Mysore 143). In the said case, it is pointed out that one of the co-owners can bring a suit for ejecting a trespasser from the property owned by him and others either jointly or as co-owner, the basis being that he has a right to hold every inch of the joint property until a division takes place and that the other co-owners are not necessary parties to the suit though they are proper parties to the suit. In our view, the said ratio has no application to the facts of this case. As noticed earlier,

the yajaman of the family who can also be considered as a co-owner had exhausted his remedy of the family against the said persons i.e., defendants 1 to 7 in O.S. 459/60 to which the other co-owners were also parties. Under these circumstances, if the suit in the present form is allowed to be proceeded with, the same would bring into being the same anomaly which we have highlighted earlier in para 28 hereinabove. Further the frame of the suit is also not on the basis reflected in the plaint in the case dealt with by this Court in Shivangouda's case. Under these circumstances, we have no hesitation whatsoever in holding that the said decision is also not helpful to the plaintiff. As pointed out earlier, elsewhere in the course of this judgment, it is not necessary for us to express our opinion as regards as to what would have happened, had the plaintiff based her suit purely as a co-owner and wanted to enforce her own individual right without reference to the rights of the other members of the family including defendant 12.

33. Sri Keshava Bhat, learned Counsel for the contesting respondents submitted that if submission of the other side particularly with reference to the maintainability of the suit and in the context of the provisions of the Madras Act is carried to its logical conclusion, it would lead the disastrous results. It is not necessary for us to go into this aspect. It will suffice if it is held that the result in every case will depend upon various circumstances. The frame of the suit, the pleadings of the parties, the evidence in the case, the background leading to the case, failure to take effective steps at the appropriate stage, allowing certain orders to become final without agitating further and taking contradictory positions in various litigations inter pane will cast their own shadow on the result of the case. Further a court of law while deciding a case is required to reach its conclusion on the basis of the provisions of law relevant for consideration in the context of the facts proved or admitted. In that view of the matter, it is not necessary for us to dilate any further on this aspect.

34. We may also point out here that defendant 12 Pakerappa Rai is shown to have expired during the pendency of the appeal before the I Appellate Court. A court of law is required to take cautious cognizance of sub-sequent events. However, in the instant case we find that the death of defendant 12 Pakerappa Rai during the pendency of the first appeal will not remedy the basic infirmity in the maintainability

of the suit. That is so because, the succeeding manager would be clothed with the same disability with which Pakeerappa Rai would have been tainted, had he himself filed the suit in question. This infirmity would continue to exist as long as the suit continued in the present form. Thus on a consideration of the submissions made at the Bar with reference to the aspects under consideration, we have no hesitation to answer the fourth and fifth aspects against the plaintiff. We would also like to make it clear that when we have said earlier that plaintiff suit is hit by the mischief of O. 23, R. 1(3),CPC (as it stood before amendment and corresponding to O.23, R. 1(4)(b) after amendment) that we meant, in substance, is that the order passed in O.S. 459/60, has a binding nature on all the members of the kutumba of which defendant-12 Pakerappa Rai was the yajaman.

35. The next aspect which needs consideration is the aspect relating to the question of improvements alleged by the contesting defendants. This aspect is not pressed by Sri Shekhar Shetty, learned Counsel for the appellants. Even otherwise we find that there is a concurrent finding on this aspect. Therefore, it is not necessary to state further on this aspect. We agree with the findings of the Courts below.

36. The last aspect which has arisen for consideration is the one relating to the rejection of the application at I.A. No. III filed before the I Appellate Court under O. 6, R. 17 R/ w S. 151, CPC on behalf of defendants 2 to 6 praying for amendment of their written statement. They wanted to amend their written statement by taking a contention that the suit of the plaintiff is barred by res judicata by reason of the judgment in O.S. No. 132/63 on the file of the Munsif, Puttur between the same parties where identical issues were raised and decided against the plaintiff and that the said decision had become final and that therefore, the suit is barred by res judicata. The learned Civil Judge while dealing with this aspect in para 29 of his judgment felt that having regard to the well clarified position by the Apex Court with reference to the question relating to res judicata, it was not necessary to allow the application. The learned Judge has also given other reasons in the course of his judgment in para 29 for rejecting the application at I.A. No. III. Sri Shekhar Shetty, learned Counsel for the appellants invited the attention of this Court to the various decisions of the Supreme Court. Among others, he has cited the decision

in Haridas Aildas Thadani v. Godrej Rustom Kermani : AIR 1983 SC319 ; the decision in A. K. Gupta and Sons v. Damodar Valley Corporation : [1966]1SCR796 ; the decision in Panchdeo Narain Shrivastava v. Km. Jyoti Sahay : AIR 1983 SC462 ; and the decision in Chintaparthi Venkataramana Reddy v. Nallan Rajamma : AIR 1988 AP40 . With reference to the said decisions, the learned Counsel contended that the Court should be extremely liberal in granting the amendment.

37. On the other hand, Sri Keshava Bhat, learned Counsel for the contesting respondents submitted that the question of res judicata in the instant case does not arise at all having regard to the fact that the capacity of the plaintiff in the two suits viz., O.S. No. 459/60 and O.S. No. 132/63 cannot be said to be the same. The learned Counsel also contended that the subject-matter of the two suits also cannot be said to be the same and the reliefs framed are also not the same. The learned Counsel has placed reliance on the decision in Smt. Isabella Johnson v. M.A. Susai (dead) by L.Rs. : AIR 1991 SC993 ; the decision in Mathura Prasad Sarj'oo Jaiswal v. Dossibai N. B. Jccjebhoy : [1970]3SCR830 and the decision in Lonankutty v. Thomman : AIR 1976 SC1645 .

In our view, it is not necessary to go into this aspect having regard to the fact that we have answered the fourth and fifth aspects against the plaintiff.

38. The substantial questions of law raised in this appeal stand answered as above.

39. For the reasons stated hereinabove, the appeal deserves to be allowed and the suit of the plaintiff is liable to be dismissed. Having regard to the close relationship of the parties, we are of the view that it would be just and proper to direct both the parties to bear their own costs all throughout.

40. In the result, the appeal is allowed. The judgment and decree dated 20-4-1982 passed by the Civil Judge, Puttur in R.A. No. 13/1979 is hereby set aside. The dismissal of the suit at O.S. No. 469/1968 by the trial Court is affirmed of course for the reasons stated hereinabove.

In the facts and circumstances of the case, we direct both the parties to bear their own costs all throughout.

41. Appeal allowed.

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