

O.S.119/2013

ORDER ON IA.NO.12

The defendant no.2, 3, 5 to 7 and 10 have filed this application U/o 6 R.17 R/w 151 of CPC seeking to include the additional para No.13(a) in order to take additional defense in the written statement contending that if Court comes to a conclusion that there was no previous partition in between the family members of Plaintiffs and Defendants, the shares in the non-suit joint family properties bearing Re.Sy.No.28/2 measuring 6 acres 20 guntas, 28/3 measuring 8 acres 3 guntas situated at Bommanakunte village, Challakere taluk and Re.Sy.No.1/28 measuring 4 acre situated at Putlarahalli Kaval village, Challakere taluk also be allotted to Plaintiffs and Defendants and suit is bad for non-inclusion of those properties.

2. The defendant No.10 has sworn to an affidavit wherein he stated that, this suit is filed against him and other Defendants seeking partition and separate possession alleging that the suit properties are joint family properties. After they put their appearance filed written statement contending about the previous partition in the year 1969. As per the claim of the Plaintiff no partition of any kind has been taken place in respect of joint family properties therefore, inclusion of all the joint family i.e, non suit properties bearing Re.Sy.No.28/2, 28/3 and 1/28 in the suit very much essential. Therefore, he intends to take additional defense in the written statement to the effect that suit is bad for non-inclusion of joint family properties. In that regard

the defence has not been taken in the written statement which is bonafide mistake. The proposed amendment will not take away any admission made in the written statement. Further, if the application is not allowed they will be put to more hardship and injury. In fact the proposed amendment is necessary to determine the real question in controversy between the parties. On these grounds the defendant no.10 has sought to allow the application.

3. The plaintiff has filed his objection indicating therein that, application is not maintainable either under law or on facts. When the stage of the case is set down for Defendant evidence this application is filed with sole intention to drag the proceedings as much as possible. The land bearing Re.Sy.No.28/2 and 28/3 are not the ancestral properties but it is self acquired properties of their mother and same is purchased out of the contribution made by her parental house. The land bearing Re.Sy.No.1/28 is self acquired property of their father. Therefore, the contention raised by the Defendants will not survive for consideration.

If the application is allowed the plaintiffs will be put to more hardship and injury then the defendants. On these grounds the plaintiffs sought to reject the application.

4. The following point arises for determination.

- 1) Whether the applicant/defendant no.2, 3, 5 to 7 and 10 have satisfied that the proposed amendment is necessary for proper adjudication of the controversy in between the parties ?
- 2) What order ?

5. I have perused the pleadings, documents available on

record and heard the arguments on both sides.

6. My finding to the above points is as follows-

Point No.1 : In the affirmative.

Point No.2 : As per final order for the following-

REASONS

7. **POINT No.1:-** This is the suit filed by the plaintiffs for the relief of partition and separate possession. It is prime contention of the Plaintiffs is that the suit properties are ancestral and joint family properties of them and Defendants. However, the husband of Defendant no.1 Late. P. Lakshmanreddy, Defendant no.9 and 10 colluding with other got entered their names in the revenue documents without their knowledge. Only after demise of husband of Defendant no.1 Late. P. Lakshmanreddy the Plaintiffs demanded their share in the suit properties but, they refused to allot the same. Thereafter scrutinized revenue documents at which point of time they came to know about the mutation of husband of Defendant no.1, 9 and 10 in the revenue records.

Hence, they constrained to file this suit. On the other hand Defendant no.2 and 10 filed their written statement admitted that the suit properties were belong to propositus of the family by name Gade Palaiah but, specifically contended that during the life time for propositus Gade Palaiah in about the year 1965 all his children partitioned the properties. As per the said previous partition they in possession of their respective shares. Amongst other grounds these Defendants sought for dismissal for the suit.

8. The Plaintiffs claims that there was no partition of any kind is taken place in respect of joint family properties whereas, Defendants contends that there was previous partition in about the

year 1965. In pursuance of the said partition all the family members are in possession of their respective properties. From the rival contentions of the parties it is cristal clear that the dispute revolves arround whether the previous partition pleaded by the Defendants is true or not. So, it is burden placed upon the Defendants to prove said fact before the Court.

9. Court has verified the plaint averments, contents of written statement, affidavit appended to it. It is trite law that an application seeking amendment should not be allowed after trial has commenced unless Court comes to a conclusion that despite due diligence, the party seeking amendment could not have filed application before commencement of trial. It is equally well settled principal that a prayer for amendment of the plaint and prayer for amendment of the written statement stands on different footings. The Court should adopt the strict procedure while considering the application for plaint amendment. Whereas, the court should take liberal view while considering the application for amendment of the written statement.

10. It is also settled law that, the defendants are entitled to take any number of contradictory defense in the written statement. In the case on hand the Defendants intends to take additional defense to effect that if Court comes to a conclusion that there was no previous partition in between the family members of Plaintiffs and Defendants, the shares in the non-suit joint family properties bearing Re.Sy.No.28/2 measuring 6 acres 20 guntas, 28/3 measuring 8 acres 3 guntas siutated at Bommanakunte village, Challakere taluk and Re.Sy.No.1/28 measuring 4 acre situated at Putlarahalli Kaval village, Challakere taluk also be allotted and suit is bad for non-inclusion of those properties. The Plaintiffs argued that the properties alleged to

be a joint family properties by the Defendants is false but, they are self acquired of their mother and father. In order to substantiate the claim they have produced the certified copy of the registered sale deed dated.28.12.1991. This sale deed is pertaining to the land bearing Re.Sy.No.28/2 and 28/3 which stands in the name of mother of Plaintiffs. It is relevant under Hindu Law there is no bar for any family members to purchase the property in their own name. Here according to Plaintiffs themselves no partition of any kind has been taken place in respect of joint family properties. Whether the land bearing Re.Sy.No.28/2 and 28/3 was purchased from the nucleus of joint family properties or not is to be ascertained in the course of trial. Here the Defendants taking an additional defense to the effect that those properties are also joint family properties and non-inclusion of those properties in this suit is not maintainable. Even if amendment is allowed the burden is upon them to prove before the Court that, land bearing Re.Sy.No.28/2, 28/3 and 1/28 are also the joint family properties. Mere allowing the amendment application in itself would not amount to granting the relief sought in the proposed amendment. The burden still remains on the Defendants to establish the claim made in the proposed amendment.

11. It is settled law that, while dealing with amendment application Court cannot go in to the question of merit of such amendment. It can only consider whether such amendment would be necessary for decision of real controversy between the parties concerned. When such being the position of law, I do not find any merits in the arguments of the Plaintiffs. As said above, the proposed amendment is just and necessary as prayed in the application. However, considering the fact that, this application has been pressed into service after much belated stage the defendants are liable to pay

reasonable cost to the plaintiffs for inconvenience caused at this stage. Accordingly, Court answer point No.1 in the **affirmative**.

12. POINT No.2: For the foregoing reasons, Court proceed to pass the following-

ORDER

I.A.No.12 filed by the defendant no.2, 3, 5 to 7 and 10 U/o 6 R.17 R/w Sec.151 of CPC is allowed on cost of Rs.300/- thereby, defendant no.2, 3, 5 to 7 and 10 are permitted to carry out the proposed amendment in their written statement within 7 days from the date of this order.

The amended written statement shall be filed by next date of hearing without fail.

Addl. Civil Judge and JMFC.,
Challakere.