

IN THE COURT OF THE CIVIL JUDGE & J.M.F.C., AT SRINGERI

PRESENT

Sri. Suryanarayana S., B.A.L.,LL.B.,
Civil Judge & JMFC., Sringeri.

Dated : This the 21st day of August, 2019.

O.S.No.16/2016

Plaintiffs:

Mr. Mohammed Yousuff,
S/o. Late Peeru Saheb,
Aged about 93 years,
Resident of Bhaktampura in
Sringeri Village, Sringeri Taluk,
Chikkamagalur District represented
Herein by his G.P.A Holder
Mr. Abdul Azeez,
S/o. Mohammed Yousuff,
Aged about 44 years,
Resident of Bhaktampura in
Sringeri Village, Sringeri Taluk,
Chikkamagaluru District **Since
dead by his LR.**

1(a) Smt. Khairunnisa
W/o. Late Mohammed Yousuff,
Aged about 78 years,
Resident of Bhaktampura,
Sringeri Village, Sringeri Taluk.

1(b) Mr. Abdul Azeez,
S/o. Late Mohammed Yousuff,
Aged about 47 years,
Resident of Bhaktampura in
Sringeri Village, Sringeri Taluk.

1(c) Smt. Sufiyabi, D/o. Late
Mohammed Yousuff and W/o.
Sayyad Noorulla, Aged about
55 years, Resident of Bhaktampura

in Sringeri Village, Sringeri Taluk.

1(d) Smt. Dilshad Banu,
D/o. Late Mohammed Yousuff
and W/o. Arif Khan, Aged about
52 years, Resident of Masidigudde,
Kinikini Hemmane, Sringeri Village,
Sringeri Taluk.

(By Sri. K.R.Suresh, advocate)

V/s

Defendants:

1. Smt. Haneefabi,
W/o. Late Ibrahim Saheb,
Aged about 90 years,
Resident of Kinikini Hemmane
(Masidi Gudde) Sringeri Village,
Sringeri Taluk.

2. Smt. Sharifabi,
D/o. Late Ibrahim Saheb and
W/o. Late Hayath Saheb,
Aged about 62 years,
Resident of Honnavalli,
Belandooru Village, Sringeri Taluk.

3. Smt Maqbool @ Mallika,
D/o. Late Ibrahim Saheb and
W/o. Kutta Alam, Aged about
53 years, Resident of Kalmettlu,
Sringeri Town and Taluk.

4. Smt. Zareena,
D/o. Late Ibrahim Saheb and
W/o. Late Adam Saheb, Aged about
50 years, Resident of Kinikini Hemmane,
(Masidi Gudde), Sringeri Village,
Sringeri Taluk.

5. Smt. Parveen,
D/o. Late Ibrahim Saheb and
W/o. Ameer Ahamed, Aged about
49 years, Resident of Kalkatte,
Menase Village, Sringeri Taluk.
6. Smt. Ameena,
D/o. Late Ibrahim Saheb and
W/o. Late Peeru Saheb, Aged about
39 years, Resident of Bhaktampura Road,
Sringeri Village, Sringeri Taluk.
7. Smt. Noorjahan,
D/o. Late Ibrahim Saheb and
W/o. Mohammed Rafeeq, Aged about
37 years, R/o. Kinikini Hemmane,
(Masidi Gudda), Sringeri Village,
Sringeri Taluk.
8. Mr. Munawar,
S/o. Late Mohammed Mastan,
Aged about 54 years, Driver,
Salal Manzil, Buddanagara,
3rd Cross, Near Ganesh Rice Mill,
Shivamogga.
9. Mr. Riyaz,
S/o. Late Mohammed Mastan,
Aged about 52 years, Driver,
Salal Manzil, Buddanagara,
3rd Cross, Near Ganesha Rice Mill,
Shivamogga.
10. Smt. Zabeena,
D/o. Late Mohammed Mastan,
W/o. Mohammed Iqbal, Aged about
50 years, Tippu Nagar, 6th Cross,
Left side, Shivamogga.

11. Smt. Naseema,
D/o. Late Mohammed Mastan,
W/o. Abdul Basheer, Aged about
48 years, Sagar Manzil Tippunagar,
4th Cross, Left side, Shivamogga.

12. Smt. Mubeena @ Rasheeda Banu,
D/o. Late Mohammed Mastan,
W/o. Mohammed Azam, Aged about
46 years, R/o. Devaramane,
Hariharapura, Koppa Taluk.

13. Smt. Rihana @ Khatiza,
D/o. Late Mohammed Mastan,
W/o. Late Fayaz Ahamed,
Aged about 45 years, Tippu Nagar,
5th Cross, Left side, Shivamogga.

14. Smt. Parzana @ Khuteza,
D/o. Late Mohammed Mastan,
W/o. Abdul Abeed, Aged about
45 years, Tippu Nagar, 5th Cross,
Left side, Shivamogga.

(D1 to D7 represented by Sri. H.R.Umesh
Heggade, advocate and D8 to D14 Placed
as Ex-parte.)

ORDERS ON I.A.NO.7

That the applicant/ Defendant No. 2 has filed this application under Order 6 Rule 17 read with Section 151 of CPC seeking permission to amend the written statement as stated in the application.

2. In the affidavit annexed to the application, the defendant No. 2 has stated that she along with her sister and deceased mother /1st defendant filed

their written statement in the present case. At the time of drafting of written statement as per the information given by her deceased mother, their counsel prepared the written statement, she along with her sisters and deceased mother have signed the written statement. Her deceased mother is an illiterate lady and she has not given full details and actual aspects with respect to the suit schedule property and all other defendants also not much literate persons. After the death of her mother/1st defendant, when the second defendant contacted her counsel she came to know about the facts that the deceased defendant No.1 without her knowledge has left out the important facts with respect to suit schedule property. As such their written is an incomplete one. Due to lack of literacy, they have filed the incomplete written statement. Hence she filed the present application to insert additional para as para no.11 in the written statement and the delay in filing the application is not intentional one. The proposed amendment stated in the application is very much necessary to prove their defence and the proposed amendment will not change the nature of the suit or cause of action. If the application is not allowed she along with other defendants will be put to untold hardship which cannot be compensated in any manner. Hence prays to allow the application.

3. Counsel for the plaintiff resisted the said application by filing objections, wherein he contended that pleading of the parties are sacrosanct and cannot be allowed to be amended at the whims and fancies of the parties, the proposed amendment has got the effect of introducing altogether new defence and it has got the effect of replacing the earlier defence. The proposed amendment changes the basic defence in the original written statement and same is neither necessary nor relevant to decide the real point of controversy between the parties. The plaintiff counsel further submits that in the present case temporary injunction is granted in favour of the plaintiff, now defendants came with the present application to change the defence, such course is not at all permitted in law. He further submits the defendant no.2 also intends to take the plea of Non-joinder of necessary parties, the said plea should be raised at the earliest point of time and cannot be allowed to be raised at a later stage by way of amendment, the defendant also sought introduce new plea that property in survey no.223 is a government property. Hence prays to reject the application with costs.

4. Heard arguments of both sides.

5. The following points that arisen for my consideration are as under:

- 1) Whether the defendant No. 2/applicant has made out sufficient grounds to allow this application ?
- 2) What order?

6. My findings to the above said points are as follows:

Point No.1 : In the Negative

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

REASONS

7. **Point No.1:** The plaintiffs have filed the present suit for the relief of partition and separate possession of their deceased father's share in the suit schedule property. Now the defendant no. 2 filed the present application seeking to insert additional para No. 11 in the written statement as mentioned in the application.

8. The provision of Order 6 Rule 17 of CPC is as follows:-

Order 6 Rule 17 of CPC is read as follows:
“the court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real question controversy between the parties:

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence the party could not have raised the matter before the commencement of trial”.

9. In the instant suit, plaintiff pleaded that the suit schedule property belongs to his mother Late. Kulsumbi. The said Late. Kulsumbi during her life time by executing will on 07-04-1997 bequeathed the suit schedule property jointly in favour of her three sons i.e., in favour plaintiff, Mohammad Masthan and Ibrahim Saheb. After the death of said Kulsumbi above said persons jointly succeeded to the suit schedule property. But the Ibrahim Saheb, the husband of defendant no.1 and father of the defendant no.2 to 7 behind the back of the plaintiff changed the khatha of the suit schedule property to his name. The said Ibrahim Saheb is also dead now. After his death the khatha of the suit schedule property changed into the name of defendant no.1 and she is also dead. The defendant no 2 to 7 are trying to sell away the suit schedule property in order to defeat the right of the plaintiffs over the suit schedule property. Hence plaintiff filed this suit for the relief of partition and separate possession of his legitimate share in the suit schedule property. Since the original plaintiff is dead, the legal representatives of plaintiff have come on record.

10. After service of summons the defendants 1 to 7 appeared through their counsel and filed their written statement by contending that the suit schedule property exclusively belongs to the Imam Saheb who is none other than the first husband of the said Kulsumbi. During their wedlock Ibrahim

Saheb was born. After the death of said Imam Saheb, Khatha was changed into the name of the Kulsumbi as Pavathi Khatha, thereafter khatha has been changed into the name of Ibrahim Saheb, who is the sole legatee of the Imam Saheb. Apart from the said Ibrahim Saheb, neither Late. Kulsumbi nor plaintiffs have any kind of right over the suit schedule property. After the death of the said Ibrahim Saheb, defendant no.1 to 7 being legal representatives of Ibrahim Saheb are in peaceful possession and enjoyment over the suit schedule property. Now deceased plaintiff's son Plaintiff no.1(b) by creating forged documents claiming the right over the suit schedule property. Hence prays to dismiss the suit.

11. In the instant case when the matter posted for filing of the list with documents and list of witnesses, the defendant's counsel reported the death of defendant No. 1 on 30-07-2018 and on the next date of hearing on 14-08-2018, the defendant no.2 filed the present application seeking to add additional para as para No. 11 to their written statement by way of amendment. On perusal of the same wherein the defendant no.2 to 7 have stated that their father Ibrahim Saheb and their mother defendant No.1 were residing in the suit schedule property since 70 years from the day of their marriage by putting shed and is in peaceful possession of the suit schedule property. At that time, the mother of the late Ibrahim Saheb had married to

one Peeru Saheb and was residing with her second husband in his house at Bakthampura. The father and mother of the defendant no.2 to 7 were only residing in the said house. The mother of the Late. Ibrahim Saheb never resided in the suit schedule property at any point of time. The Father of the defendant No. 2 to 7 by his own earnings constructed the existing house in the suit schedule property. The suit schedule property situated in a Government land in survey no. 223 of Sringeri village. The deceased defendant No.1 had filed an application before the concerned authority for regularization of her possession in the suit schedule property and the said application is pending for consideration. Apart from defendants no one is having any kind of right over the suit schedule property. The suit schedule property still not granted in the name defendant No. 1 and as per provision of KLGPA act this court has no jurisdiction to try the present suit and also stated that plaintiff not made all the legal representatives of the Late. Ibrahim Saheb as parties to the suit.

12. The defendant no.2 stated in the application that the defendant no.1 being an illiterate lady without proper knowledge left out the important actual facts with respect to suit schedule property, the other defendant also not much educated. Hence their written statement is incomplete one. After

the death of the defendant No.1, the defendant No. 2 contacted her counsel and she came to know about the said facts and as such she filed the present application. Per contra the plaintiff counsel contended that the proposed amendment has got the effect of introducing altogether new defence by replacing earlier defence. Hence such an amendment which changes basic defence in the original written statement cannot be allowed to be introduced by way of amendment.

13. In general a defendant in a suit is also entitled to seek amendment of his written statement, but he is not allowed to withdraw an admission made in his written statement. In *Modi. Spg. & Wvg. Mills Co. Ltd., Versus Ladha Ram & co.* reported in AIR 1970 SC 680 wherein the Hon'ble Supreme court of India held as follows:-

Order 6 Rule 17- Amendment of Written Statement- Not allowed when the effect would be to displace the plaintiff's suit and deprive him of a valuable right already accrued to him- An entirely different and new case cannot be substituted by this process- Defendant can place his contention when issues to be framed.

14. Further in Heeralal Versus Kalyan Mal Reported in AIR 1998 SC 618 wherein it is held that

Order 6 Rule 17, Order 15 rule 1 and section 115-
Amendment of pleadings – Inconsistent pleas- Partition suit
- Withdrawal of admission made in the written statement by
defendant which would displace plaintiffs case and cause
him irretrievable prejudice not permissible - Admission of
such a nature that plaintiff could have asked the court to
pass a preliminary decree under order 15 rule 1 – Issues
framed by trial court on the basis of admission -
Subsequently withdrawal of the admission by amendment
of written statement sought by defendant on unsustainable
grounds – Held, amendment cannot be allowed - High court
in exercises of revisional power under section 115 was not
justified in interfering with trial courts order dismissing
application for amendment of pleadings.

15. The ratios laid down in the above said cases aptly applicable to facts and circumstances of the present case. In the instant case after hearing on both sides, this court had passed an order on I. A. No. 1 filed under order

39 Rule 1 and 2 of CPC. Thereafter on the basis of rival pleadings issues have been framed in the present suit. In the instant case previously defendants taken contention that the suit schedule property belonged to the Imam Saheb, first husband of Late. Kulsumbi and their father Ibrahim Saheb being a sole legatte of the said Imam Saheb is only having right over the suit schedule property, neither the deceased plaintiff nor Late. Kulsumbi had any right over the suit schedule property. Now the defendant no.2 by way of amendment seeking to introduce new defence by stating that the suit schedule property acquired by their father exclusively belong to them and suit schedule property situated in Survey No. 223 of Sringeri village which belongs to government. The defendant No.1 had filed an application for grant of land in her favour and as such the defendants are only having rights over the suit schedule land is nothing but a introduction of a new defence by withdrawing their earlier defence and the same cannot be maintained under law.

16. The Hon'ble Supreme court of India in Usha Balashaheb Swami versus Kiran Aappasao Swami reported in Air 2007 SC 1683 held as follows

Order 6 Rule 17 – Plaint and Written Statement –
Amendments of – Difference in principles applicable, laid
down – Reasons therefor, explained – Held, Addition of a

new ground of defence or substituting or altering a defence or taking inconsistent pleas in written statement can be allowed as long as the amended pleadings do not result in causing grave injustice and irretrievable prejudice to plaintiff or displacing him completely.

17. As per the ration laid down in the above case, by looking into facts of the present case, as per the rival pleadings this court has already framed issues in the present case and now the defendants have sought to introduce altogether new defence by withdrawing their earlier defence. Though the defendants are having right to take inconsistent pleas, the proposed amendment of written statement sought by the defendant no. 2 if permitted would completely change the nature of original defence and Effect of the amendment would displace the plaintiff's case and deprive the plaintiffs of a valuable right accrued in their favour. The defendant no. 2 had also signed the written statement filed and she kept quiet till the death of her mother and now she has sought for amendment of written statement on unsustainable grounds is not acceptable. No bonafide intention found in filing the application. If the amendment is allowed plaintiff will be put to grave prejudice and the same cannot be compensated by any means. The

defendants have not made out sufficient grounds to allow the application as prayed. Accordingly I answered the point no.1 in the negative.

18. **Point No.2:** In view of my findings on point No.1, I proceed to pass the following-

ORDER

Application filed by the defendant No.2 under Order 6 Rule 17 of C.P.C. is hereby dismissed.

(Directly typed by me in the computer, then corrected and pronounced by me in the open court on this 21st day of August 2019)

(Suryanarayana. S)
C ivil Judge and JMFC,
Sringeri.

(Orders on I.A.No.7 is pronounced in the open court, vide separate order)

ORDER

Application filed by the defendant No.2 under Order 6 Rule 17 of C.P.C. is hereby dismissed.

**(Suryanarayana S.)
Civil Judge and JMFC,
Sringeri.**