

**IN THE COURT OF CIVIL JUDGE AND JMFC
AT HOLENARASIPURA**

Present:- Sri.R.Mahesha, B.A.L, LL.B,
Civil Judge and J.M.F.C,
Holenarasipura.

Dated this the 21st day of December, 2018

O.S.No.134/2008

Smt.Rani and others : Plaintiffs

(By Sri.B.N.R., Adv.,)

V/s

Chikkamallamma & others : Defendants

**(D1 & 2 By Sri.P.D.D. Adv.,
D3, 6, 8 to 11 by Sri.H.S.A. Adv.,
D4 by Sri.J.N.Adv., D5 - exparte
D12 by Sri.R.S. Adv.
D13 to 15 by Sri.K.S.S.Adv.,)**

COMMON ORDERS ON IA NO.38 TO 40

The plaintiff filed present applications u/o 6 rule 17 of C.P.C seeking permission to amend the plaint as reason stated in the application and U/o 18 Rule 17 of CPC and Section 151 of CPC praying to reopen the case for recalling of DW.1 for cross examination.

2. In the annexed affidavit, the plaintiff had sworn that, the suit filed for partition and separate possession in respect of joint family properties. After institution of said suit, the defendant illegally partitioned the properties on 21/02/2009. Therefore the said partition deed is not binding on the plaintiff's rights. Hence, the proposed amendment is very much necessary to prove the said facts. In the present case, at the time

of cross examination of DW.7 not elucidating some facts about Ex.D7 partition deed dated 21/2/2009 produced by the DW.1. The said facts come into knowledge at the time of preparation of argument. In order to ascertain fact, the cross examination of DW.1 is very much necessary as he intended to cross examine the DW.1. Hence he preferred the present applications and prays for allow the applications.

3. The defendant No.3 and 5 to 11 filed objection to the said application. In the objection contending that the partition took place on 21/02/2009 is not made party to plaintiff. The document produced by the defendant more than one year, now he intended to amend the plaint at the time of case set down for argument only drag the proceedings. Hence prays for dismissal with exemplary cost.

4. The defendant No.12 filed detailed objection by contending that the present application is not maintainable either in law or on facts which is liable to be dismissed. In the present suit, on two occasions DW.1 fully cross examined. Now once again the plaintiff preferred the application seeking permission to recall of DW.1 for further cross examination is not tenable as case set down for arguments. He preferred the application after lapse of nearly one year. It is intention of plaintiff to drag the proceedings. Moreover the present matter is of the year 2008. Further the defendant No.3 and 5 to 11 filed objection to the said application. In the objection contending that when the case set down for argument, he preferred the present application to recall of DW.1 is not tenable. The plaintiff reasons stated in the application is not believable and at this stage filed only drag the proceedings. Hence prays for dismissal with exemplary cost.

5. Heard argument from both sides. Perused the records.

6. The points that would arise for my consideration are as follows.

1. Whether the amendment is necessary for elucidating the matter in controversy between both parties?

2. Whether the plaintiff has been made out sufficient ground to consider the IA No.39 and 40?

2. What order?

7. My answer the above points are as follows.

Point No.1:- In the Negative

Point No.2:- In the Negative

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

REASONS

8. **Point No.1 and 2:-** Perused entire case papers, it discloses that the present suit filed the relief of partition and other consequential relief in respect of suit properties against the defendants in the year 2008. After appearance of opponents/defendants and after completion of pleadings, this court framed issues on 7/09/2010. After get 4 adjournments plaintiff filed examination in chief and examined as PW.1. Meantime some interim applications filed, after considering other side objections and arguments interim applications disposed off and again case posted for cross of PW.1. Despite provide sufficient time, PW.1 remained absent before the court, therefore on 19/10/2011 this court passed an order as "**PW1 present, advocate for the plaintiff absent, hence evidence of PW.1 is discarded, suit dismissed for non prosecution**". Again this case restored as per order passed in Mis.No.7/2011 on 13/01/2014. Again plaintiff took proper steps to get appearance of defendants. Again case posted for cross of PW.1, after get appearance of other defendants.

Meantime several applications filed, same are disposed off. Plaintiff took sufficient time to complete plaintiff side evidence. Plaintiff side entire evidence closed. On 20/07/2017 and case posted for defendant side evidence. The defendants also took several adjournments to led defendants side evidence. On 30/08/2017 defendant No.3, 6 to 11 advocate filed application U/o 8 Rule 1(a) of CPC to production of some document. Plaintiff counsel filed his objections to that IA. After heard both side, this court passed detailed order on IA No.23 (U/o 8 Rule 1(a) of CPC) and registered partition deed dated 21/02/2009 taken on record subject to proof and relevancy documents also marked through DW.1 as Ex.D3 to 9 on 23/10/2017. Plaintiff counsel lengthy cross examined on 09/11/2017 and 30/11/2017. On careful perusal of cross examination portions of plaintiff side, he did not ask any questions regarding Ex.D3. Plaintiff actively participated in further proceedings of the case. The present applications filed on 13/12/2018 to amend plaint prayer column and seeking recall of DW.1 to cross examine on Ex.D3.

9. It is admitted facts that in this case trial already completed. Case posted for arguments on main, but both parties filed several applications to recall one other witness. Therefore the present case proceedings are protracted. It is well established principal of law that as per order 6 Rule 17 of CPC, any amendment to the pleadings is to be carried out before the commencement of trial and even inspite of any due diligence the amendment cannot be carried out before trial, they only the court can permit the amendment of pleadings. In this case plaintiff has not stated why he has not filed necessary applications at appropriate time and why he is not asking on questions on Ex.D.3. Further the plaintiff intended to recall of DW.1 for cross examination on Ex.D3. This court provide sufficient opportunity, did not utilized properly. Due to bonafide mistake litigant cannot be punished it can be covered within the meaning of

expression "**due diligence**". The present applications are filed at frag-end trial without assign any reasons. Under such circumstance, in the absence of due diligence or any facts beyond the control of plaintiff, this application for amendment is not maintainable. Since the IA No.38 is not considering, IA No.39 and 40 does not survive for consideration. Accordingly **I answer Point No.1 and 2 in the Negative.**

10. **Point No.2:** For the aforesaid discussion, I proceed to pass the following.

::O R D E R::

The applications i.e IA No.38 to 40 filed by the Plaintiff dated 13/12/2018 Under Order 6 Rule 17 of CPC and U/o 18 Rule 17 of CPC and Section 151 of CPC are hereby dismissed.

No order as to cost.

(Dictated to stenographer, directly on computer, typed by her revised and corrected by me then pronounced in the open court dated this 21st day of December, 2018)

(R.Mahesha)
Civil Judge and J.M.F.C,
Holenarasipura.