

**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 15th day of March, 2019

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.,)**

ORDERS ON IA NO.46

The plaintiffs have filed present application u/o 6 rule 17 of C.P.C seeking permission to amend the plaint as stated in the application.

2. In the annexed affidavit, the plaintiff had sworn that, the suit filed for partition and separate possession in respect of joint family properties. At the time of instituting the suit, the RTC of property situated at Kamasamudra and Mavinakere village mentioned as A

schedule property. Out of that, suit item No.6 and 7 properties are also belongs to Mavinakere village. Due to typographical error, the same are left out in the plaint. Further suit item No.3 has been wrongly mentioned as 49/2a instead of 42/9 and also suit item No.6 property has been wrongly mentioned 32/2 instead of 34/2. The said mistake came to the knowledge of plaintiff, while preparation of canvassing the argument. The typographical mistake is not intentional one, its bonafide mistake. Hence the plaintiff preferred the present application to seek amendment of plaint and the proposed amendment is very much necessary to prove the case. Hence she 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 present application is not maintainable either in law or on facts, which is liable to be dismissed. The amendment sought in the application, but why she slept from 11 years did not seek amendment and not stated about who is owner of Sy.No.49/2 measuring 12 guntas and also why left out 12 guntas of property. The plaintiff has not stated proper reason to wrong entry of suit item No.6. The plaintiff has not stated proper reasons to seek amendment. The plaintiff produced only certified copy of

suit item No.8 and not mentioned proper reason why left out the said property. At this stage, the plaintiff preferred the present application 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, plaintiff seeks amendment of plaint. The plaintiff kept quite all these days and has filed this application to fill up lacuna. In the present case, already both side evidence has been completed and even heard arguments of plaintiff side in part. If this court to give permission to amend the plaint, it would lead to reopening of the case and also for tendering the evidence on the pleadings, which sought in the amendment. The plaintiff has not stated proper reason why the application filed at earlier stage. 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. What order?

7. My answer the above points are as follows.

Point No.1:- 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 for 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. The said application came to be rejected on 21/02/2018. Thereafter the plaintiff filed one more application to discharge the Plaintiff No.2 as she is attain majority, the same is allowed and case set down for necessary amendment. After filing amendment plaint, the case posted for its original stage argument. When the case posted for argument, the plaintiff counsel filed the application to seek amendment of plaint. The acts of the plaintiff definitely cause injury to opponent as well as court. If plaintiff has good case. But he intentionally filed mischievous applications.

9. Now it is pertinent to discuss specific provision fundamental rules of amendment of pleadings.

Order VI Rule 17 Reads as under:

Order IV Rule 17: Amendment of pleading: The court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and no 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 in controversy between the parties.

The above rule confers a very wide discretion on courts in the matter of amendment of pleading. As a general rule leave to amend will be granted so as to enable the real question in issues between parties to be raised in

pleadings. Where amend will occasion no injury to the opposite party and can be sufficiently compensated for by lost or other terms to be imposed by the order.

10. The Rules of interpretation to be followed in the interpreting this provision are very simple. The provision can be divided into two parts.

The first part is discretionary (may) and give wide and confattered discretion to decide on the case to case basis, whenever it appears to be just the court may or may not allow. The amendment to the proceedings for determining the real questions of controversy. The approach of the court should be liberal and not hypothetical. Hence amendment to proceedings is not a right rather, it is in the discretion of the court.

The second part is mandatory (shall) and orders the court to accept all applications necessary for the purpose of determining the real issue between parties. If it finds that the parties could not here raised. The issue in spite of due diligence before the commencement of trial. However such discretion must be exercised by applying the judicial mind.

11. At this stage it is pertinent to note that the Hon'ble Supreme Court decision reported in **Gangabai V/s Vijaykumar** has rightly observed "the power to allow the an amendment undoubtedly wide and may at any stage be appropriately exercised in the interest of justice,

the law of limitation notwithstanding but the exercise of such for reaching discretion any powers is government by judicial considerations and wide the discretion, grater ought to be the care and circumspection on the part of the court". Generally the following cases, leave to amend will be refusal by the court.

1) The amendment will be refused when amendment is not necessary for the purpose of determining the real question in controversy between parties.

2) leave to amend will be refused if it introduce a totally different, new and inconsistent case or charge the fundamental character of the suit or defence.

3) leave to amend will be refused where the effect of the proposed amendment is to take away from other side a legal right accrued in his favour.

4) Leave to amend will be refused where the application for amendment is not made in good faith.

12. In the present case as discussed supra. The present application is filed at a belated stage with an intention to protract proceedings, which cause delay in disposal of suit on merits. On careful perusal of entire record it conform that the present suit filed in the year 2008. Both parties contest the suit since 2008 to 2019 very contests based on pleadings. The burden is on plaintiff to prove plaint averments. Both parties adduced

evidence and produced documents. Now he sought for amendment as prayed in IA. Why should not plaintiff looked into documents since 2008, it was not explained. The entire case conducted by very same advocate, after restoration suit i.e. since 2014 he himself conducted cross examination at very length but he did not verify the documents which are produced by plaintiff. Admittedly in this case arguments of plaintiff side heard, trial completed very long back. Now at this stage come up with this application for amendment of plaint. The plaintiff has not stated in the affidavit what prevented to stating these facts at the time of preparing plaint or before commencement of trial and why there is such delay in coming with this application. It is settled preposition of law regarding amendment of plaint in various cases. The Hon'ble Apex court clearly held that

" Leave to amend may be refused if it introduces a totally different, new and inconsistent case, or challenges the fundamental character of the suit. The proviso to Order VI Rule 17 of the CPC virtually prevents an application for amendment of pleadings from being 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 the trial. The proviso, to an extent, curtails absolute discretion to allow amendment at any stage. Therefore, the burden is on the person who seeks an amendment after commencement of the trial to show that in spite of due diligence, such an amendment could not have been sought earlier. There cannot be any dispute that an amendment cannot be claimed as a matter of right, and under all circumstances. Though normally amendments are allowed in the pleadings to avoid multiplicity of litigation, the Court needs to take into consideration whether the application for amendment is bona fide or mala fide

and whether the amendment causes such prejudice to the other side which cannot be compensated adequately in terms of money".

13. 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 or 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.

14. Having regard to the totality of the facts and circumstances of the case it is my considered view or opinion that the application for the amendment of plaintiff is not only belated but also not bonafide, if allowed it definitely change the entire evidence already led by the both parties in court and affect to stand taken by parties, same would lead to a traversity of justice. Therefore the present plaintiff had failed to explain why should not mum since 2008, if she know property particulars why should not bring application as much as earlier possible. It can be clear that the plaintiff have not interested in pursue suit. 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 application is filed at frag-end trial without assign any reasons. Under such circumstances, I am of the opinion that the plaintiffs have not made out due to in the absence of due diligence or any fact beyond the control of plaintiff not included at the earlier. Therefore this court opinion that this application is not maintainable or sustainable. Accordingly **I answer Point No.1 in the Negative.**

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

::O R D E R::

The application/IA No.46 filed by the Plaintiff Under Order 6 Rule 17 of CPC is hereby dismissed on cost of Rs.200/-.

Cost shall be payable to TLISA, Holenarasipura.

(Dictated to stenographer, directly on computer, typed by her revised and corrected by me then pronounced in the open court dated this 15th day of March, 2019)

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