

THE HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO

I.A. No.1 of 2023

in

APPEAL SUIT No.751 OF 2010

ORDER:

1. This petition is filed under Order 6 Rule 17 of Civil Procedure Code, 1908 (for short 'C.P.C.') by the petitioners/appellants seeking to amend the written statement in O.S. No.198 of 2003 on the file of III Additional Senior Civil Judge (Fast Track Court), Guntur (for short, 'the trial court') by adding paras as 17(a) and 17(b) after para No.17.

2. Brief averments of the affidavit filed by the 1st petitioner accompanied with the petition, follows:

(a) The 1st petitioner is the 1st appellant in the main appeal. Respondents 2 to 6 are the children of the 1st petitioner's husband, late Suraiah, through his 1st wife, i.e., the 1st respondent herein; the 5th respondent initiated the suit (O.S. No.198 of 2003) before the trial Court, seeking partition of the suit A & B schedule properties into six equal shares and allocation of one such share to her. Alternatively, she sought to divide the properties into nine equal shares and allocate one such share to her; the 1st petitioner, submitted a written statement opposing the claim made by the 5th respondent.

(b) The 1st petitioner also filed a separate suit (O.S. No.132 of 2007) against the respondents herein before the trial Court, seeking permanent injunction; both suits were consolidated and evidence was led in O.S.No.198 of 2003; following the completion of trial and hearing from

both sides, the trial Court passed a preliminary decree in O.S.No.198 of 2003. It dismissed the 1st petitioner's suit in O.S. No.132 of 2007 in a common Judgment, dt.10.06.2010.

(c) Furthermore, it is asserted that on 22.07.1988, the petitioners and the respondents, partitioned the suit schedule properties by way of an unregistered partition deed (Ex.B.28). According to Ex.B.28, A-schedule properties were allocated to the respondents, while B-schedule properties were assigned to the 1st petitioner. Additionally, the respondents/ defendants 1 to 4 executed a letter of acknowledgement/acceptance dt.23.07.1998 (Ex.B.29). Based on Ex.B.28, the respondents transferred the A-schedule properties through registered sale deeds (Exs.B.1, B.2, B.3 and B.5) along with a registered gift deed dt.05.03.2008 (Ex.B.4). The affidavit asserts that the respondents in collusively concealed the existence of the Ex.B.28, Ex.B.29, Exs.B.1 to B.5, and filed the suit in O.S.No.198 of 2003 with false claim.

(d) It is further stated that the preliminary decree passed by the trial Court is considered invalid and nullity, and this Court is empowered to enquire into the matter, particularly, in light of section 44 of the Indian Evidence Act, as laid down by the Hon'ble Apex Court. The 1st respondent did not raise the issues of fraud, collusion and misrepresentation in her original written statement before the trial Court. However, these pleas are very much essential for effective adjudication of

the ongoing dispute. The proposed amendment, as detailed in the written statement does not alter the cause of action or change the nature of suit, instead it only supplements the existing facts already on record and does not resulting any surprise or prejudice to the contentions of the respondents/plaintiffs.

3. The 5th respondent filed a counter, disputing claims made in support of the petitioner's affidavit and asserts the following contentions:

(a) The trial Court passed a preliminary decree in favour of the 5th respondent; the 1st petitioner is not legally wedded wife of their father; the petitioners did not raise the issue of alleged unregistered partition in the earlier suit; the alleged unregistered partition deed (Ex.B.28) is inadmissible; if the alleged partition were true, the petitioners would have taken that plea earlier; in O.S. No.132 of 2007 also, the petitioners did not raise the alleged partition, indicating that Ex.B.28 is fabricated; the petitioners filed the appeal in 2010, but they did not take any steps in the matter until now; the current application comes more than 20 years after the suit was filed and 13 years after the Judgment was passed; the alleged registered sale deeds vide Exs.B.1, B.2, B.3 and B.5 are not relevant at this stage; the plea of collusion and suppression of material documents should have been included in the earlier written statement; they did not suppress any material documents and there was no earlier partition. It is further asserted that as per the proviso Order 6, Rule 17 of C.P.C., it clearly shows that no application for amendment

shall be allowed after the trial has commenced unless the Court concludes that despite due diligence, the party could not have raised the matter before the commencement of the trial.

4. The 6th respondent filed a counter affidavit, contending that Ex.B.28 is an unregistered partition deed defined U/sec. 2(15) of Stamp Act and is a document that should have been compulsorily registered according to U/sec.17 of Registration Act; the 5th respondent initiated O.S.No.198 of 2003 in the trial Court, based on the 1st petitioner's claim, requesting the partition of plaint A and B schedule properties. The 1st petitioner filed O.S.No.308 of 2003 seeking permanent injunction, 15 years after the alleged Ex.B.28 partition deed; the said suit was transferred to Guntur and renumbered as O.S.No.132 of 2007 before the trial Court. In the original plaint in O.S. No.308 of 2003, she did not mention Exs.B.28 or B.29 and assert that the lands were her Stridhana properties. It was only in the 1st week of December 2002, that the defendants negotiated for a portion of the lands, but the 1st petitioner refused, stating that properties were exclusively Stridhana properties. Pending the suit, the 5th respondent colluded with plaintiffs/appellants, leading to the 6th respondent filing a petition to be transposed as the 2nd plaintiff, which was granted as per orders in I.A.No.310 of 2009, dt.07.10.2009. On 20.08.2009, the 1st appellant stated for the first time that Ex.B.28 (partition deed) was marked subject to objection. In her written statement, she pleaded for the dismissal of the suit concerning

the B-schedule properties on the grounds that they were her Stridhana properties. It is asserted that the appellant is aware that no evidence can be introduced without appropriate pleading, and she attempted to amend the pleadings based on her evidence. Such an amendment cannot be allowed after the closure of evidence, especially when it contradicts her earlier assertion regarding the Stridhana property.

5. Heard Sri Sravan Kumar Mannava, learned counsel for the petitioners/appellants and Sri N. Sriram Murthy, learned counsel for the 5th respondent and Sri A. Rama Mohan Rao, learned counsel for the 6th respondent.

6. Now, the point for determination is:

Whether the petitioners/appellants established the grounds to amend the written statement in O.S.No.198/2003 on the file of III Addl. Senior Civil Judge Court, Guntur?

7. Learned counsel for the petitioners contends that the object of Order 6 Rule 17 of C.P.C., means that the Court should try the merits of the case that comes before it and should consequently allow the amendments that may be necessary for determining the real question in controversy between the parties. Before proceeding with the matter, it is made clear that this Court is not supposed to express any opinion on the merits of the case at this stage, this Court will consider the facts which are necessary only for the disposal of the petition.

8. Based on the available record, it is evident that the suit in O.S.No.198 of 2003 was filed on the file of learned III Additional Senior Civil Judge, Guntur, seeking partition of the suit A & B schedule properties. After trial, the suit in O.S. No.198 of 2003 was disposed of, by passing the preliminary decree. The suit in O.S. No.132 of 2007 was also filed in the same Court, seeking a Permanent Injunction. Both the suits were consolidated, and the evidence was led in O.S. No.198 of 2003. The suit in O.S. No.132 of 2003 was dismissed.

9. Aggrieved by the judgment passed in O.S. No.198 of 2003, the defendants preferred the present appeal as A.S. No.751 of 2010. Aggrieved by the judgment passed in O.S. No.132 of 2007, the plaintiffs in the said suit preferred the appeal, which is renumbered as TRAS.No.1 of 2022. Both the appeals are pending before this Court.

10. The respondents' counsel contends that though the petitioners filed an application seeking to amend the written statement, but such an application was not moved in the TRAS.No.1 of 2022. The petitioners' needs to clarify why they did not seek an amendment of the plaint in O.S.No.132 of 2007, especially since many of the schedule properties are common to both suits. In O.S.No.132 of 2007, the plaintiffs assert that 'B' schedule properties in O.S.No.198 of 2003 are Stridhana properties. However, in the current proceedings, the petitioners are contending that the 'B' schedule properties were subjected to partition and are joint family properties. Learned counsel for the respondents relied on a

decision reported in **Avanigadda Venkayamma vs. Munnangi Raghavulu¹**, wherein it is held that:

“A party to the suit cannot be allowed to approbate and reprobate.”

11. I find considerable force in the submission of the counsel for the respondents. Courts are required to weigh the scale of the balance of justice in respect to both parties, and the principle cannot be given a go-by under the guise of a liberal approach. Discretionary power must be exercised with caution, due care, and circumspection. The Court is required to exercise discretion judiciously, cautiously and strictly in compliance with the basic principles laid down in this regard in a catena of decisions of the Hon’ble Supreme Court.

12. The petitioners are now seeking permission to amend the written statement in O.S.No.198 of 2003 by stating that as per the unregistered partition deed, dated 22.07.1998, 'A' schedule properties are allocated to the respondents and 'B' schedule properties are allocated to the petitioners. However, they have not provided a satisfactory explanation as to why these pleas were not included in their original written statement while the suit was ongoing. The suit was eventually decreed on 10.06.2010 and the appeal was filed in 2010. Thirteen years after filing the appeal, they have come up with this petition. It is not their case that they were unaware of the existence of the partition deed, when they filed their original written statement. They are blaming the plaintiffs in

¹ 2023 (3) ALT 642 (A.P.)

O.S.No.198 of 2003 of concealing the earlier unregistered partition deed. But they have not clarified why they did not raise this issue in their original written statement. Furthermore, they claim that the unregistered partition deed was marked as Ex.B.28, indicating their knowledge of its existence and filing in the trial Court. However, they did not take steps to amend the written statement at that time. Having suppressed the existence of the partition deed in the written statement, this Court views that the petitioners' cannot blame the respondents now. The parties are not supposed to adduce evidence without support of the pleadings. However, the trial Court has permitted them to adduce evidence regarding the partition deed. Now, the petitioners want to amend the written statement in tune with the evidence. This Court views that it is not permissible under the law. If ultimately it is established that both parties want to defeat the rights of the third parties by suppressing the execution of the partition deed, the Court may pass appropriate judgment while disposing of the appeal to protect the interests of third parties. Suppose the petitioners' contention regarding the partition of the properties is accepted to be true, and both parties admit the execution of the unregistered partition deed and enjoy the properties in pursuance of the partition deed, it may be nothing but playing fraud by both parties to defeat the interest of third parties who said to have purchased the properties.

13. The learned counsel for the petitioners relied on a decision reported in ***Bagh Amberpet Welfare Society, Hyderabad and others vs. State of A.P.***², the Composite High Court of Andhra Pradesh relied on a decision of the Full Bench of the Bombay High Court in ***Guddappa Chikkappa Kurbar vs. Balaji Ramji Dange***, wherein it is observed that:

“No Court will allow itself to be used as an instrument of fraud, and no court, by the application of rules of evidence or procedure, can allow its eyes to be closed to the fact that it is being used as an instrument of fraud”.

14. The learned counsel for the petitioners relied on a decision reported in ***S.P. Chengalvaraya Naidu (dead) by Lrs. Vs. Jagannath (dead) by Lrs and others***³, the Hon’ble Apex Court held that:

“6.xxx A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is cheating intended to get an advantage.

xxx Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the Court.

xxx A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document to gain advantage on the other side, then he would be guilty of playing fraud on the Court and on the opposite party.”

² 2015(2) ALT 795 (S.B.)

³ (1994) 1 S.C.C. 1

15. The principle in the above decision can be equally applicable to both parties. As such, the contention raised by the petitioners regarding fraud played by the other side by suppressing admitted facts and their effect can be considered at the stage of final adjudication of the matter. This Court views that power conferred under Order 6 Rule 17 C.P.C., is subject to a rider put by the proviso to Order 6 Rule 17 added in terms of C.P.C. (Amendment Act of 2002), which provides that no application for amendment should be allowed after the trial has commenced, unless the Court concludes that despite due diligence, the party could not have raised the matter, for which amendment is sought, before the commencement of the trial.

16. Learned counsel for the petitioners relied on decision reported in ***Life Insurance Corporation of India vs. Sanjeev Builders Private Limited and another⁴***, wherein the amendment is allowed, this Court finds that it has no application to the facts of the case as the suit in the said case has been instituted on 08.06.1979 before the amendment to Order 6, Rule 17 C.P.C. and further, the suit is yet to be adjudicated.

17. Learned counsel for the petitioners also relied on a decision reported in ***Vineet Kumar vs Mangal Sain Wadhera⁵***, wherein the Hon'ble Apex Court held that:

"17. The appellant in the present case only seeks the protection of the new Rent Act, which became applicable to the premises in question

⁴ 2022 S.C.C. OnLine SC 1128

⁵ (1984) 3 SCC 352

during the pendency of the litigation. We see no reason why the benefit of the new Rent Act be not given to the appellant. Section 20 of the new Rent Act provides a bar to a suit for eviction of a tenant except on the specified grounds as provided in the section.

Section 39 also indicates that the parties are entitled to make necessary amendments in their pleadings and to adduce additional evidence where necessary."

18. As it is a suit instituted subsequent to the amendment to Order 6 Rule 17 of C.P.C., the learned counsel for the petitioners needed to explain how the above observations can be made applicable to the present facts of the case, more particularly when the New Rent Act provide provision to make necessary amendments in the pleadings.

19. Even otherwise, as per proviso to Order 6, Rule 17 C.P.C., no application for amendment shall be allowed after the trial has commenced unless the Court concludes that despite due diligence, the party could not have raised the matter before the commencement of trial. The principles applicable to the amendments of the plaint are equally applicable to the amendments to the written statement. Here, in this case, the suit is disposed of, and the appeal is pending for more than ten years. From the pleadings, it comes out that the petitioners were very much aware of the facts relating to the execution of the partition deed, which they now want to incorporate in the written statement by seeking amendment. Therefore, nothing prevented them from taking those pleas in the written statement and raising the same at that time.

20. On a careful perusal of the pleadings which are raised in the amendment application, this Court views that the grounds raised in the amendment application do not even remotely show that, despite the exercise of due diligence, these matters could not be raised by the appellant during the pendency of the suit. Under the circumstances, the case is covered by Proviso to Rule 17 of Order 6 C.P.C., and therefore, the relief deserves to be dismissed.

21. Accordingly, I.A. No.1 of 2023 is ***dismissed*** without costs.

JUSTICE T. MALLIKARJUNA RAO

Date: 29.09.2023
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