

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s).266 OF 2011
(arising out of SLP(C)No.22894/2010)

A.R. USHA AND ANOTHER ...Appellant(s)

VERSUS

A.A. GANGA AND OTHERS ...Respondent(s)

O R D E R

Leave granted.

This appeal is directed against order dated 20.4.2010 passed by the learned Single Judge of the Madras High Court whereby he allowed the petition filed by respondent Nos.1 and 2 under Article 227 of the Constitution, set aside the order passed by Additional District Judge (FTC No.1), Madurai (hereinafter referred to as 'the trial Court') and granted leave for amendment of the written statement.

The plaintiffs-appellants filed O.S. No. 282/1984 for partition and 1/4th share of the suit properties No.1 and 3 along with possession and for 1/6th share in the securities - second item of the suit properties with accrued dividends. They pleaded that the suit properties belonged to late A.R. Sahasranam, father-in-law of first plaintiff and defendant nos.4 to 8, father of defendant nos.1, 10 and 11 and the grandfather of second plaintiff and defendant Nos. 2, 3, 5 to 7

2

and 9. They have relied upon Will dated 6.3.1961 executed by A.R. Sahasranam in respect of item Nos. 1 to 3 of the suit property and claimed that they and the defendants are entitled to their respective shares.

In their written statement, respondent Nos.1 and 2 denied the averments contained in the plaint and pleaded that the plaintiffs-appellants are not entitled to share in the suit property. They also pleaded that some of the items have not been included in the plaint filed by the plaintiffs-appellants in O.S. No. 411/1992 and they reserve their right to file additional written statement if the same are included in O.S. No.282/1984.

It is not clear from the record as to when the issues were framed, but this much is evident that the trial of the suit commenced in July, 2008. The plaintiffs examined two witnesses and closed their evidence. Thereafter, the suit was posted for arguments. At that stage, respondent Nos.1 and 2 filed an application under Order VI Rule 17 for grant of leave to amend the written statement by incorporating the plea that some other properties belonging to the joint family should be included in

the plaint schedule. The appellants contested the application by asserting that the properties sought to be included in the plaint schedule were their self-acquired properties and respondent Nos.1 and 2 have nothing to do with the same.

By an order dated 11.11.2008, the trial Court dismissed the application for amendment. The learned Additional District Judge observed that the application was filed after the commencement of trial and that there was no valid ground for

3

entertaining the same. He then held that if some properties are not included in the plaint schedule, ultimate losers will be the plaintiffs and not the defendants.

The learned Single Judge set aside the order of the trial Court by observing that as per the judgments of this Court in North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (Dead) by Lrs.(2008) 8 SCC 511, Rajkumar Gurawara (Dead) through Lrs. v. S.K. Sarwagi and Company Private Limited and another (2008) 14 SCC 364 and Vidyabai and others v. Padmalatha and another (2009) 2 SCC 409, there is no bar against allowing of amendment after the commencement of trial and if the parties are able to satisfy the requirement of proviso to Order VI Rule 17, the amendment can be allowed. The learned Single Judge observed that if the properties specified in the amendment application are included in the plaint, that would put an end to litigation and would also avoid multiplicity of the proceedings.

We have heard learned counsel for the parties and perused the records. Order VI Rule 17 of the Code of Civil Procedure (C.P.C.) as it stands after 1979 amendment reads thus:

"17. Amendment of pleadings.--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 questions in 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."

4

The expression "due diligence" has not been defined in the Code of Civil Procedure but generally the word "diligence" means careful and persistent application or effort. As per Black's Law Dictionary (Eight Edition), the word "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. No straitjacket formula can be evolved for deciding whether or not the party seeking amendment of the pleadings has acted with a due diligence and each case has to be decided on its own facts. However, from the plain language of the proviso to Order VI Rule 17 this is clear that after the commencement of trial, the Court cannot grant leave for amendment of the pleadings unless it records a clear finding that in spite of exercise of due diligence, the applicant could not raise the matter before the commencement of trial.

In Rajkumar Gurawara v. S.K. Sarwagi and Company (P) Ltd. (supra), this Court referred to the amended Order VI Rule 17 and observed:

"The first part of the rule makes it abundantly clear that at any stage of the proceedings, parties are free to alter or amend their pleadings as may be necessary for the purpose of determining the real questions in controversy. However, this Rule is subject to proviso appended therein. The said Rule with proviso again substituted by Act 22 of 2002 with effect from 1-7-2002 makes it clear that after the commencement of the trial, no application for amendment shall be allowed. However, if the parties to the proceedings are able to satisfy the court that in spite of due diligence they could not raise the issue before the commencement of trial and the court is satisfied with their explanation, amendment can be allowed even after commencement of the trial.

5

To put it clear, Order 6 Rule 17 CPC confers jurisdiction on the court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the court to satisfy the conditions prescribed in the proviso."

(emphasis supplied)

If the impugned order is examined in the light of the plain language of amended Order VI Rule 17 and the judgment noted herein above, we have no hesitation to hold that the learned Single Judge committed a serious error by setting aside the order of the trial Court and granting leave to respondent Nos. 1 and 2 to amend the written statement. A careful reading of the order under challenge shows that even though the learned Single Judge did not find any jurisdictional infirmity or patent legal error in the order passed by the trial Court, he accepted the prayer of respondent Nos.1 and 2 by simply observing that it would be in the interest of the parties that all the properties are put in the scheme of partition and that would bring an end to the litigation and avoid multiplicity of the proceedings. There is nothing in the impugned order from which it can be inferred that the learned Single Judge felt

6

satisfied that at the time of filing the written statement, respondent Nos.1 and 2 could not take the plea sought to be incorporated by amendment despite exercise of due diligence. In the absence of such satisfaction, the learned Single Judge was not justified in setting aside the order of the trial Court and granting leave to respondent Nos.1 and 2 to amend the written statement.

Court Master
(Signed Order is placed on the file)

Court Master