

THE HONOURABLE SRI JUSTICE M.S. RAMACHANDRA RAO

C.R.P.No.64 of 2011

%15-09-2015

#Vasa Soma Sundara Andal Sampoorja Saraswathi,
W/o.Veera Venkata Gangaraju, and others
.... Petitioners

Versus

\$Konduru Loka Viswa Appala Naga
Sri Ranga Venu Bhaskararao, S/o.Late Gangaraju,
And others.
Respondents.

< GIST:

> HEAD NOTE:

!Counsel for the petitioners : Ms.N. Revathi,
for Sri N.
Satyanarayana.

^ Counsel for the respondents : Sri C.B. Rammohan
Reddy

? Cases referred

1. 2006 (5) ALT 52 SC
2. AIR 1951 SC 177
3. 2007 (4) ALD 801

4. (1996) 2 SCC 26
5. (2009) 11 SCC 609
6. 2014 (2) ALD 149 (SC)
7. 2015 (1) ALT 113
8. AIR 1967 SC 96
9. (2007) 5 SCC 602
10. (2009) 10 SCC 84
11. 2015 (2) ALT 592
12. (1996) 2 SCC 25
13. (1978) 2 SCC 91

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P.No.64 of 2011

ORDER :

This Revision is filed under Article 227 of the Constitution of India challenging the order dt.08.07.2010 in I.A.No.552 of 2009 in O.S.No.14 of 2007 on the file of Additional District Judge, Family Court-cum-Additional District Court, West Godavari, Eluru.

2. The petitioners in the Revision are plaintiffs in the above suit.

3. The petitioners herein are first, third and fourth daughters of one Late K. Gangaraju. Their father was the adopted son of a person also known as Late K. Gangaraju. The respondents are the brothers of petitioners.

4. The petitioners alleged that plaint 'A' and 'B' schedule properties originally belonged to their father and he had obtained them from his father; that their father and respondents divided these properties under a registered partition deed dt.19.10.1981; in the said partition, 'A'

schedule properties fell to the share of their father; both plaint 'A' and 'B' schedule properties are the self-acquired properties of their father; their father executed a Will dt.03.04.2006 bequeathing the plaint 'A' schedule property to petitioners and 'B' schedule property to respondents; and the said document was his last and final testament, since he died on 04.04.2006. They therefore prayed for : (a) declaration that the said Will dt.03.04.2006 executed by their father is the last and final Will and testament of their father;

(b) for a consequential decree for possession of plaint 'A' schedule property directing the respondents to vacate the same forthwith and put the petitioners in peaceful and vacant possession thereof, and

(c) a decree for Rs.1,25,000/- towards past profits on item Nos.1 and 2 of the plaint 'A' schedule property, by directing respondents to pay the said amount to them with subsequent interest from the date of suit till realisation; and

(d) future profits and costs.

5. The respondents filed written statement opposing the suit claim. They alleged that, no doubt, there was a partition between their father Late K. Gangaraju and the respondents' father under the partition deed dt.19.10.1981, and the plaint 'A' schedule property fell to

the share of their father, but they denied that plaint 'A' and 'B' schedule properties are the self-acquired properties of their father. They disputed the Will dt.03.04.2006 set up by petitioners. They contended that plaint 'A' schedule property is the joint family property of their father and contended that they executed a registered Will dt.24.06.2002 at Vijayawada, that under the said Will they became entitled to all the movable and immovable properties of their father after his death.

6. Issues were framed, but trial did not commence.

7. On 12.06.2009, the petitioners filed I.A.No.552 of 2009 under Order 6 Rule 17 C.P.C. to amend the plaint.

8. They contended that notwithstanding their plea that they are entitled to plaint 'A' schedule property under the Will dt.03.04.2006 executed in their favour by their father Late K. Gangaraju, as an *alternative plea*, they should be allowed to plead that on the death of Late K. Gangaraju on 04.04.2006, as per Sec. 6 of the Hindu Succession Act, 1956 [as amended by the Parliament, through Act 39/2005 w.e.f 09.09.2005] (for short, 'the Act'), the petitioners had become coparceners with their father; that respondents, having divided and separated from Late K. Gangaraju under the partition deed dt.19.10.1981, were no longer coparceners with him; and if a notional partition is done before his death, Late K. Gangaraju and each of

petitioners would each get a 1/4th undivided share in the properties and the 1/4th share of their father has to be divided among his sons and daughters, i.e the petitioners since they are class-I heirs.

9. Counter-affidavit was filed by respondents opposing the said application. They contended that the provisions of the Act have no application. They contended that, having taken a plea in the plaint that the plaint 'A' and 'B' schedule properties are self-acquired properties of Late K. Gangaraju, the petitioners are now raising a contrary plea that the plaint schedule properties are joint family properties of Late K. Gangaraju and themselves; that petitioners having pleaded that they are entitled to plaint 'A' schedule property under the Will dt.03.04.2006, cannot be allowed to take such an inconsistent plea; when there was already a partition of the properties belonging to Late K. Gangaraju in 1981, which was also admitted by petitioners, there would not be any coparcenary right between Late K. Gangaraju and petitioners; that the amendment to the Act had taken place in the year 2005 even before filing of the suit, and therefore the petitioners would have taken such a plea, but they did not do so; therefore, they are not entitled to seek any alternative relief; and that the plea now raised would change the entire nature of the suit, and would cause disadvantage to respondents.

10. By order dt.08.07.2010, the Court below rejected I.A.No.552 of 2009. It held that petitioners, having taken a plea that the plaint 'A' and 'B' schedule properties are self-acquired properties of Late K. Gangaraju, cannot now take a plea that the properties of Late K. Gangaraju ought to be treated as coparcenary property, and they are entitled to a share therein invoking the amendment to the Hindu Succession Act, 1956 ; that petitioners had knowledge that the Act was amended in 2005 and they did not state what prevented them from filing this petition immediately after filing the suit or at the time of filing the suit; that inconsistent pleas cannot be taken by plaintiffs. It relied on the decisions in **Baldev Singh and others v. Manohar Singh and another**^[1] and held that plaintiffs cannot raise inconsistent pleas. It observed that assuming without admitting that petitioners can be treated as coparceners, since there was already a partition between Late K. Gangaraju and respondents (his sons) in 1981 and the property admittedly fell to the share of Late K. Gangaraju, it has to be treated as his separate property, and it cannot be said that it is joint family property or ancestral property. It distinguished the decisions in **Firm Srinivas Ram Kumar v. Mahabir Prasad and others**^[2] and **Parchuri Sambasiva Rao and others v. Parchuri Srinivasarao and others**^[3] cited by petitioners and held that the plea now sought to be introduced by way of

amendment is inconsistent with the original plea.

11. Challenging the same, the present Revision is filed.

12. Heard Ms. N.Revathi for N . Satyanarayana, counsel for petitioners; and Sri C.B. Rammohan Reddy, counsel for respondents.

13. The counsel for petitioners contended that the view taken by the Court below is unsustainable and contrary to law; that even the plaintiff in a suit is entitled to take alternative and inconsistent pleas and the view of the Court below that petitioners are disentitled to take the alternative plea of the nature mentioned in the affidavit filed in support of I.A.No.552 of 2009 on the ground that it is inconsistent with the plea raised in the plaint, cannot be sustained. She further contended that while deciding whether or not to allow the application for amendment, the merits of the case sought to be set up by way of amendment cannot be gone into, and that the court below erred in expressing an opinion on the same while deciding I.A.No.552 of 2009; that only after allowing the amendment and after trial is conducted, the court can express an opinion on this plea. She relied upon the decisions in **Firm Srinivas Ram Kumar** (2 supra), **Gulabrao Keshavrao Patil and others v. State of Gujarat and others** ^[4], **Sarva Shramik Sangh v. Indian**

Oil Corporation Limited and others^[5], Praful Manohar Rele v. Krishnabai Narayan Ghosalkar and others^[6], and A. Krishna Rao v. A. Narahari Rao and others^[7].

14. On the other hand, the counsel for respondents refuted the above contentions and supported the order passed by the court below. He contended that a plaintiff, unlike a defendant cannot take inconsistent pleas, and that there is a prohibition for a plaintiff to raise inconsistent pleas even in the alternative. He relied upon the decisions in **A.K. Gupta and Sons Ltd. v. Damodar Valley Corporation^[8], Usha Balashaheb Swami and others v. Kiran Appaso Swami and others^[9], Revajeetu Builders and Developers v. Narayanaswamy and Sons and others^[10], and G . S . Prakash v. Polasa Hanumanlu^[11].**

15. I have noted the submissions of both sides.

16. From the facts narrated above, it is clear that in the plaint, the petitioners contended that both plaint 'A' and 'B' schedule properties are self-acquired properties of their father Late K. Gangaraju. In the written statement, the respondents had taken a plea that plaint 'A' and 'B' schedule properties are not the self-acquired properties of Late K. Gangaraju, but they admitted that plaint 'A'

schedule property had fallen to the share of Late K. Gangaraju in a partition between himself and respondents on 19.10.1981. No doubt, both the petitioners and respondents had relied upon different Wills said to have been executed by Late K. Gangaraju in their favour. While the petitioners relied upon a Will dt.03.04.2006, the respondents relied upon a registered Will dt.24.06.2002.

17. Therefore, in view of these pleadings, it is necessary for the Court below to frame issues not only as to whether the above said Wills are genuine or not but also as to whether the plaint 'A' and 'B' schedule properties are self-acquired properties of Late K. Gangaraju or not.

18. Admittedly, the trial has not commenced. Therefore, proviso to Order 6 Rule 17 C.P.C. which restricts the power of the Court to allow amendment has no application.

19. In the application for amendment filed by petitioners, they sought to raise as an alternative plea that plaint 'A' schedule property was allotted to Late K. Gangaraju in the partition which occurred on 19.10.1981 between himself and respondents; that item no.1 of the plaint 'A' schedule property had been acquired by Late K. Gangaraju under registered sale deeds with the joint family funds and the same had also been allotted to Late

K. Gangaraju, though it is not specifically mentioned in the partition deed; that except item no.2 of plaint 'A' schedule property, the other items had been disposed of by Late K. Gangaraju himself; therefore, plaint 'A' and 'B' schedule properties are joint family properties of Late K. Gangaraju in which the petitioners were coparceners. They contended that they became entitled to a share therein by virtue of the amendment which took place in 2005 to the Hindu Succession Act, 1956 vide Act 39/2005; and they made it clear in the application seeking the amendment that it is an alternative plea.

20. Undoubtedly, there is a variation between the original plea in the plaint that the A and B schedule properties are 'self acquired' properties, and the plea now sought to be introduced by way of amendment that they are 'joint family properties' of Late K.Ganga Raju and themselves.

21. Therefore, the point for consideration is whether a plaintiff is permitted to take such alternative and inconsistent pleas.

22. In **Firm Srinivas Ram Kumar** (2 supra), in a suit for specific performance of a contract, the plaintiff had originally pleaded that a house was agreed to be sold to him for Rs.34,000/- and out of this amount a sum of Rs.30,000/- had been paid to the creditors of the vendors,

and he would put in possession of the house in question. He alleged that having promised to execute a conveyance in his favour, the defendants went back on their promise, and did not execute any conveyance in his favour, and they later sold the property to a third party. The defendants denied that they had agreed to sell the house to the plaintiff and executed any agreement of sale in his favour. They alleged that since they needed money they approached the plaintiff for a loan, and a sum of Rs.30,000/- was advanced by plaintiff to them only as a loan. They contended that for facilitating payment of interest due on the loan, and not in part performance of the contract of sale, the plaintiff was put in possession of the property. The purchaser pleaded that he is a *bona fide* purchaser for the value, without notice of the suit agreement of sale. The trial court dismissed the suit for specific performance, but granted a money decree for a sum of Rs.30,000/- to plaintiff. The plaintiff challenged the judgment in appeal in the Patna High Court. The defendants filed cross-objections, questioning the grant of a money decree. The appeal of plaintiff was dismissed and the cross-objections of defendants were allowed. The Patna High Court held that without a plea by plaintiff in the plaint about the loan allegedly given by him to defendants, no relief could have been granted to him on the basis that the sum of Rs.30,000/- had been advanced as a loan. This was questioned in the Supreme Court by the plaintiff.

In the Supreme Court, it was contended that the High Court was wrong in setting aside the money decree which was given against the defendants by the trial judge. A Three Judge Bench of Supreme Court observed that the High Court had taken a rigid and technical view and that the trial court was right in granting a money decree. It observed that it was no part of the plaintiffs case that the sum of Rs.30,000/- was advanced by way of loan to defendants, *but it was open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree of money, even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence.* It held that *the fact that such a prayer would have been inconsistent with the other prayer was not really material.* It held that *a plaintiff may rely upon different rights alternatively and there is nothing in the C.P.C. to prevent a party from making two or more inconsistent sets of allegations, claiming relief therein in the alternative.* It further observed that *although a court cannot grant relief to a plaintiff in a case in which there is no foundation in a pleading on which the other side was not called upon or had opportunity to meet, but when the alternative case which the plaintiff could have made was not only admitted by defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon*

the case which the defendant himself makes. It further observed that the demand of plaintiff based on defendant's own plea cannot possibly be regarded with surprise by the latter, and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. It held that in such circumstances, when no injustice can possibly result to defendant, it would not be proper to drive plaintiff to file a separate suit.

23. The view that a plaintiff is entitled to plead even inconsistent pleas while seeking alternative reliefs was reiterated by a two Judge Bench of the Supreme Court in **G . Nagamma and another v. Siromanamma and another**^[12]. In that case, a suit for specific performance of an agreement of re-conveyance was filed by appellants. Later, an application for amendment of the plaint was sought stating that the transactions of execution of sale deed and obtaining a document for re-conveyance were single transactions, i.e., it was a mortgage by conditional sale. So alternatively plaintiff sought relief to redeem the mortgage. The trial court and the High Court of Andhra Pradesh rejected the same on the ground that the suit was filed for specific performance and that the amendment would change the nature of the suit as well as the cause of action. But the Supreme Court reversed the said decision and held that *since the*

plaintiff was seeking alternative reliefs he is entitled to plead even inconsistent pleas and that the amendment of the plaint would neither change the cause of action nor would affect the relief.

24. In **Sarva Shramik Sangh** (5 supra), the question whether a petitioner in a writ petition can raise inconsistent pleas was considered. The Supreme Court clarified at para.19 that *when there is no inconsistency in the facts alleged the party is not prohibited from taking alternative pleas available in law, and that on the same facts, different or alternative reliefs can also be claimed.*

25. Recently, in **Praful Manohar Rele** (6 supra), the Supreme Court had followed the decision in **Firm Srinivas Ram Kumar** (2 supra) and **G. Nagamma and another** (12 supra) and reiterated the principle that *alternative and inconsistent pleas can be taken by a plaintiff.* In that case, the plaintiff had alleged that the original defendant and his legal representatives were occupying the suit premises as gratuitous licensees and upon termination of such licence, the plaintiff was entitled to a decree for possession. The trial court found that defendants were tenants and not licensees as alleged by plaintiff. The 1st appellate court recorded a finding to the contrary, held that the defendants were let into the suit property by plaintiff on humanitarian grounds and as gratuitous licensees and the license was validly

terminated by plaintiff. It thus negated the defence of defendants that they were tenants. In the plaint itself, the plaintiff had taken an alternative plea that he was entitled to vacant possession of the premises on the ground of *bona fide* personal need, nuisance, annoyance and damage allegedly caused to the premises and to the adjoining garden land belonging to him by the defendants. The Supreme Court held that the *alternative plea of plaintiff and the defence set up by defendants was no different from each other*. The Court held that *it was open to plaintiff not only to take a plea of license but also to alternatively plead tenancy in support of his plea for relief of recovery of possession*. It held that defendants had specifically admitted that the property belongs to plaintiff and that they were in occupation thereof as tenants, and an issue was also framed whether defendants were in occupation as license or as tenants, and defendants had full opportunity to prove their respective cases. So the defendants cannot be said to have been taken by surprise by the alternative case pleaded by plaintiff nor could any injustice would result to them from the alternative plea being allowed and tried by the Court. It observed that even if the alternative plea had not been allowed to be raised in the suit filed by appellant he would have been certainly entitled to raise that plea and seek eviction in a separate suit filed on the very same grounds.

26. I am of the considered opinion, and having regard to the above decisions, particularly the Three-Bench Judgment of the Supreme Court in **Firm Srinivas Ram Kumar** (2 supra), *it is permissible for plaintiff to take inconsistent pleas in the alternative particularly, when the pleas said to be introduced by way of amendment by plaintiff was also the plea raised by respondents.* The respondents cannot then plead that they have been taken by surprise or any prejudice is caused to them, if plaintiff is allowed to take an inconsistent plea as an alternative to base the suit claim.

27. In **A.K. Gupta and Sons Ltd.** (8 supra), relied upon by counsel for respondents, the counsel relied upon certain observations in the minority judgment of Justice Raghubar Dayal to the effect that the real question in controversy must be gathered only from the plaint and to some extent from allegations in the written statement and if the point to be decided as a result of the amendment is not covered by the controversy raised by the plaint and the written statement, the amendment is not be allowed necessarily as it would be unnecessary to allow it to determine the real questions in controversy between the parties. The learned Judge had also opined that amendments to be allowed should relate to such matters, which, due to bad drafting of plaint could not be clearly and precisely expressed, though the parties did really

intend to have those matters determined by the Court. The majority however disagreed with the said view and observed that if the said view is accepted, no material fact could ever be amended or added and the term “cause of action” cannot be restricted to mean that every fact which is material to be proved to entitle the plaintiff to succeed. It further observed that the said expression means “a new claim made on a new basis constituted by new facts” and only such amendments which seek to introduce a new set of ideas to the prejudice of any right acquired by any party by lapse of time, could not be allowed. This judgment therefore cannot be of any assistance to respondents.

28. In **Usha Balashaheb Swami** (9 supra), also cited by counsel for respondents, the Court was actually considering the question of a defendant seeking amendment to a written statement. While observing that in case of amendment of a written statement, courts are more liberal than in case of amendment of plaint, it was observed that the general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim, applies to amendments to plaint, and that it has no counter-part in the principles relating to amendment of a written statement. The Court also observed that addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written

statement, would not be objectionable but adding, altering or substituting a new cause of action in the plaint may be objectionable. It is however pertinent to note that while holding so, the Supreme Court had not held that inconsistent pleas in the alternative cannot be taken by plaintiff. It had also not referred to the Three-Bench Judgment of the Supreme Court in **Firm Srinivas Ram Kumar** (2 supra) or the judgment of the Supreme Court in **G. Nagamma and another** (12 supra). It has also not specifically observed that inconsistent pleas are allowable only in the written statement and not in the plaint. In fact, it was mainly considering whether there was any withdrawal of admission in the written statement by defendant who sought to amend a written statement, and on facts, came to the conclusion that there was no withdrawal of any admission made in the written statement by the amendment. It laid down the principle that a party cannot be allowed to wriggle out of admission but it is permissible to add a rider and/or proviso, keeping the admission intact on the basis that even an admission can be explained. So, in my considered opinion, even this judgment cannot be of any assistance to respondents.

29. In **Revajeetu Builders and Developers** (10 supra), cited by respondents' counsel, another Two-Judge Bench of the Supreme Court also had an occasion to deal with Order 6 Rule 17 C.P.C. In that case, the

judgment of the Supreme Court in **Usha Balashaheb Swami** (9 supra) was followed. It referred to the judgment in **Ganesh Trading Co. v. Moji Ram**^[13] at para no.50 wherein the Court observed that if a plaintiff seeks to alter the cause of action itself and introduces it indirectly through amendment of his pleadings, an entirely new or inconsistent cause of action, amounting virtually to the substitution of a new plaint or a new cause of action in place of what was originally there, the Court will refuse to permit it, if it amounts to depriving the party, against which a suit is pending, of any right which may have accrued in its favour due to lapse of time.

30. In my considered opinion, these observations also do not come to the aid of respondents, inasmuch as, even in the judgment in **Ganesh Trading Co.** (13 supra), it had not referred to the judgment of the Three-Bench Judgment of the Supreme Court in **Firm Srinivas Ram Kumar** (2 supra).

31. In any event, if the pleas sought to be introduced by plaintiff by way of amendment is also the plea which the defendant has set up in his written statement, and if such a plea of plaintiff is an alternative plea even though it is inconsistent with the original plea, since there is no prejudice caused to the defendant, the Court is not precluded from allowing the amendment. This principle follows from judgments of the Supreme Court in **Firm**

Srinivas Ram Kumar (2 supra), which has been reiterated in **G. Nagamma and another** (12 supra) and **Praful Manohar Rele** (6 supra).

32. In the present case, while it is the plea of petitioners in original plaint that the plaint schedule properties are self-acquired properties of Late K. Gangaraju, the defendants had set up a plea that they were not self-acquired properties of Late K. Gangaraju. Therefore, obviously their plea is that the properties were joint family properties of Late K. Gangaraju. Therefore, even though the plaintiffs had originally taken a plea in the plaint that the plaint schedule properties are the self-acquired properties of Late K. Gangaraju, since they wish to take an alternative plea (that even if the properties are treated as joint family properties of Late K. Gangaraju they would be entitled to a relief in the suit), they can be allowed to do so for the reason that such an alternative and inconsistent plea would not cause any prejudice to respondents (who themselves have pleaded that the plaint 'A' and 'B' schedule properties are not self-acquired properties of Late K. Gangaraju).

33. Therefore, the Court below, in my considered opinion, had erred in refusing to allow petitioners to take the alternative plea that the plaint 'A' and 'B' schedule properties are joint family properties of themselves and Late K. Gangaraju, and seek relief by invoking the Hindu

Succession Act, 1956 [as amended by the Parliament through Act 39/2005] as alternative basis for suit claim.

34. Moreover, while deciding whether or not to allow the application for amendment, it was not open to the Court below to go into the correctness of the pleas set up by plaintiff in the application for amendment and express an opinion thereon. This is clearly impermissible in law. Therefore the observations made by Court below as to the actual nature of the 'A' and 'B' schedule properties are not warranted.

35. In this view of the matter, the Civil Revision Petition is allowed. The order dt.08.07.2010 in I.A.No.552 of 2009 in O.S.No.14 of 2007 on the file of Additional District Judge, Family Court-cum-Additional District Court, West Godavari, Eluru is set aside; and the Court below is directed to permit the petitioner to amend the plaint as sought for; and ignore its observations with regard to merits of such amendment, while deciding the suit. No order as to costs.

36. Miscellaneous applications, pending if any, in this Revision shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 15-09-2015

Ndr/*

LR Copy to be marked : YES

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- [\[1\]](#) 2006 (5) ALT 52 SC
 - [\[2\]](#) AIR 1951 SC 177
 - [\[3\]](#) 2007 (4) ALD 801
 - [\[4\]](#) (1996) 2 SCC 26
 - [\[5\]](#) (2009) 11 SCC 609
 - [\[6\]](#) 2014 (2) ALD 149 (SC)
 - [\[7\]](#) 2015 (1) ALT 113
 - [\[8\]](#) AIR 1967 SC 96
 - [\[9\]](#) (2007) 5 SCC 602
 - [\[10\]](#) (2009) 10 SCC 84
 - [\[11\]](#) 2015 (2) ALT 592
 - [\[12\]](#) (1996) 2 SCC 25
 - [\[13\]](#) (1978) 2 SCC 91