

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **28.11.2016**

CORAM:

THE HONOURABLE MR.**JUSTICE K.K.SASIDHARAN**

**C.R.P.(P.D.) No.3010 of 2016 and**  
**CMP.No.15202 of 2016**

1.R.P.Sarathy

2.B.Latha

3.B.Jayashree

...Petitioners

versus

Narasu's Coffee Company  
By Sivanantham  
16, Court Road, Johnsonpet,  
Salem - 636 007.

...Respondent

**PRAYER:** Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 31.07.2015 in I.A.No.141 of 2014 in O.S.No.50 of 2012, on the file of II Additional District Judge, Salem.

For Petitioners : Mr.T.R.Rajagopal, Senior Counsel  
for Ms.P.Veena Suresh

For Respondent : Mr.ARL.Sundaresan, Senior Counsel  
for Mr.I.Arokiasamy

**ORDER****Introductory**

The respondent, representing the Partnership firm, filed a suit for partition of the suit properties into four shares and allotment of one such share. Subsequently, the respondent filed an application in I.A.No.141 of 2014 for amendment of the plaint "to declare that the suit properties were the properties of the erstwhile firm viz., Narasu's Coffee Company and now the property of Narasus Coffee Company Limited" and for delivery of possession. The learned II Additional District Judge, Salem, allowed the application for amendment under a mistaken notion that similar petition filed by the petitioners herein for amendment in O.S.No.11 of 2010 was allowed. Feeling aggrieved, the respondents in I.A.No.141 of 2014 are before this Court.

**Brief Facts**

2. The respondent filed a suit in O.S.No.50 of 2012 contending that Narasu's Coffee Company was constituted as a firm and that several items of properties were purchased by the firm in the name of individual partners. The partner of the firm, who signed the plaint representing the firm Narasu's Coffee Company contended that the plaintiff is entitled to 20% share as partner and 2.5% share as a Trustee in the

Mahalakshmi Ammal Trust. In short, the respondent herein contended that the plaintiff is entitled to 22.5% share in the properties shown in the schedule. The respondent, therefore, prayed for a preliminary decree dividing the suit properties and allotting 22.5% shares, besides a decree of injunction, restraining the petitioners herein from alienating or encumbering the properties.

3. The respondent, thereafter filed an application in I.A.No.141 of 2014 for amendment of the plaint.

4. The respondent in the affidavit filed in support of the application in I.A.No.141 of 2014 contended that the firm was re-constituted as a company with effect from 01.04.2009. The petitioners herein retired from the firm on 27.08.2006. The petitioners are therefore not having shares in the properties of the erstwhile firm. The respondent contended that the amalgamated company is having 100% share in the properties of the erstwhile firm Narasu's Coffee Company and as such, it is necessary to seek a decree of declaration and possession.

5. The interlocutory application was opposed by the petitioners by filing counter affidavit. Before the Trial Court, the petitioners contended that altogether a new prayer is sought to be introduced by the respondent, by way of amendment. In short, it was contended that the suit for partition is sought to be converted into a suit for declaration and possession. According to the petitioners, the nature of the suit would undergo substantial change, in case, the amendment is allowed.

6. The learned Trial Judge was of the view that liberal approach should be adopted by the Court in the matter of amendments of pleadings to prevent multiplicity of proceedings. The learned Trial Judge in paragraph 8 of the order indicated that the petitioners have filed another suit in O.S.No.11 of 2010. In the said suit, the petitioners filed an application to amend the plaint in I.A.No.66 of 2015. Since the said application was allowed, the learned Judge was of the view that similar indulgence should be shown to the respondent also. Even though several other contentions were taken by the petitioners, the learned Trial Judge appears to have not given any definite finding on merits. The learned Judge ultimately allowed the amendment application.

### **Summary of Submissons**

7. The learned Senior Counsel for the petitioners contended that the plaint proceeds as if the plaintiff is a firm. By way of amendment, the respondent seeks amendment of the plaintiff's name inasmuch as the earlier plaintiff was a firm and the new plaintiff is a company. The learned Senior counsel by placing reliance on the affidavit filed in support of the interlocutory application in I.A.No.141 of 2016 contended that by way of amendment, the very nature of suit is sought to be changed. The Trial Court on a misconception that similar application was filed by the petitioners in I.A.No.66 of 2015 in O.S.No.11 of 2010, allowed the application filed by the respondent for amendment. According to the learned Senior counsel, the petitioners are not the plaintiffs in O.S.No.11 of 2010. The petitioners were arrayed as respondents 2, 5 and 4 respectively, in the said suit. The learned Senior Counsel contended that the learned Trial Judge without verifying the records or dealing with the objections raised by the petitioners simply allowed the application for amendment.

8. The learned Senior Counsel placed reliance on the following authorities to substantiate his contention:-

a) The decision in **Revajeetu Builderrs and Developers v.**

**Narayanaswamy and Sons and others [(2009) 10 SCC 84]** was cited to contend that in case the proposed amendment constitutionally or fundamentally changes the nature and character of the case, such amendment is not permissible.

b) The judgment of the Supreme Court in **Rajkumar Gurawara (Dead) Through Lrs v. S.K.Sarwagi and Company Private Limited and another [(2008) 14 SCC 364]** was relied on to reiterate the contention that when the amendment would result in introducing new cause of action, or change in the nature of suit, it would not be a sound exercise of judicial power to direct amendment.

c) The case of **Bharat Karsondas Thakkar v. M/s.Kiran Construction Co. and Others [AIR 2008 SC 2134]** was cited to contend that in case the nature and character of the suit would change on account of amendment, the plaintiff is not entitled to maintain the application.

9. The learned Senior Counsel for the respondent submitted that due to inadvertence, the plaint was drafted in such a way as if the firm was still in existence. The amendment petition was filed even before filing written statement by the petitioners. The firm got merged with the newly formed company and as such, there would not be any change in

the nature of the suit, even if the plaint is amended. The learned Senior Counsel contended that the petitioners executed a Retirement Deed and as such, they are not entitled to the properties of the firm. It was his further contention that amendment would not change the case pleaded by the respondents in the plaint filed originally. According to the learned Senior Counsel, Order 1 Rule 10 of CPC permits substitution of the plaintiff, in case, the suit was instituted in the name of wrong person. The respondent after allowing the application paid Rs.23 lakhs as court fee and only thereafter, the Civil Revision Petition was filed. The learned Senior Counsel admitted the factual error committed by the Trial Court in its observation that the petitioners herein filed similar application for amendment and the suit for partition was converted as a suit for accounts.

10. The learned Senior Counsel cited the following judgment of the Hon'ble Supreme Court in support of his contention that liberal approach should be taken in the matter of amendment:

a) **Rameshkumar Agarwal v. Rajmala Exports Private Limited and others [(2012) 5 SCC 337]**

**Relevant observation:**

While deciding the application for amendment, ordinarily the Court must not refuse, bonafide, legitimate, honest and necessary amendment. Liberal approach should be the general rule, particularly in case, where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

### **Discussion**

11. The suit in O.S.No.50 of 2012 was instituted by the firm M/s.Narasu's Coffee Company represented by Thiru.P.Sivanantham. The plaint was filed on 14.03.2012. There was no specific averment mention as to whether Thiru.P.Sivanandam filed the suit in his capacity as the Managing Partner of the firm. The respondent in the plaint filed originally contended that the first petitioner herein filed a suit in O.S.No.106 of 2009 for partition, wherein, a claim was made that six items of properties standing in the name of the firm alone are the properties of the firm. The respondent contended that the properties standing in the name of the individual partners are deemed to be the properties of the firm and as such, all the partners are entitled to a share in such properties. The signatory to the plaint therefore contended that he is entitled to 22.5% share in the properties shown in

the schedule to the plaint.

12. The respondent filed an application in I.A.No.141 of 2014 on 03.06.2004 seeking amendment of the plaint.

13. The respondent in the affidavit filed in support of the application in I.A.No.141 of 2014 contended that the firm Narasu's Coffee Company was constituted as a company with effect from 01.04.2009. The company was registered under the provisions of Indian Companies Act. The petitioners herein executed a Retirement Deed on 27.08.2006. The Deed provides that the petitioners henceforth have no right or liability in respect of the erstwhile firm. The signatory to the plaint contended that in view of the reconstitution, he is entitled to the entire properties standing in the name of the erstwhile partners. The respondent, therefore wanted a decree of declaration that the suit properties were the properties of the erstwhile firm Narasu's Coffee Company and now the properties of the plaintiff company. The respondent wanted a consequential direction to the petitioners to deliver possession of the suit properties.

14. The petitioners in the counter affidavit in I.A.No.141 of 2014

contended that the properties purchased by the partners are private properties and they were not purchased by using the funds of the firm. The petitioners contended that by amendment, the nature of the suit, basis of the plaint, nature of relief and cause of action would be changed. It was contended that a new plaint cannot be filed under the guise of amendment of the existing plaint.

15. The learned Trial Judge was expected to consider the amendment application in the light of the settled legal principles. The Court must examine the plaint originally filed and the amendment sought to be made in the plaint and decide as to whether on account of the amendment, there would be a substantial change in the nature and character of the original suit. To put it otherwise, the Court is obliged to examine as to whether the proposed amendment would constitutionally or fundamentally change the nature and character of the suit.

16. The Supreme Court in **Ganga Bai vs. Vijay Kumar and Others, (1974) 2 SCC 393** while considering the scope of Order VI Rule 17 CPC observed that exercise of such far reaching discretionary power to allow amendment of pleadings is governed by judicial considerations and wider the discretion, greater ought to be the care

and circumspection on the part of the Court.

17. The learned Trial Judge made no serious attempt to consider as to whether on account of the proposed amendment, the nature and character of the suit would undergo a sea change.

18. The respondent wanted amendment of the plaint on the ground that the firm was reconstituted as a company and as such, the new company is entitled to the entire properties purchased in the name of the individual partners of the erstwhile firm. However, the fact remains that none of the documents relating to the reconstitution or the retirement of the petitioners from the firm were produced before the Trial Court. It was only before this Court, the respondent produced the material documents relating to reconstitution and the Deed of Retirement.

19. The Trial Court wanted to balance the equities. The Trial Court observed that there was an application for amendment at the instance of the petitioners in a connected suit in O.S.No.11 of 2010. The said application was allowed by the Trial Court. The Trial Court indicated that the petitioners are the beneficiaries of an order of amendment in

I.A.No.66 of 2015 and as such, similar indulgence should be given to the respondent also. The learned Judge observed that, if a suit for partition could be converted into a suit for rendition of accounts, the suit for partition can be converted into a suit for declaration also.

20. The Trial Court committed a factual error by observing that the petitioners filed the application in I.A.No.66 of 2015 in O.S.No.11 of 2010 for amendment. The suit was not filed by the petitioners. This factual error would go to the root of the matter, inasmuch as it was mainly only on account of the said finding, the application for amendment filed by the respondent in I.A.No.141 of 2014 was allowed.

21. The respondent has produced documents before this Court after arguments and reserving the revision petition for orders, to substantiate its contention with regard to the reconstitution and the Deed of Retirement of the petitioners from the firm. There is no question of considering those documents in the Civil Revision Petition without marking it in the interlocutory application before the Trial Court especially, after concluding the arguments. The respondent ought to have produced those documents before the Trial Court, so as to enable

the learned Trial Judge to arrive at a *prima facie* satisfaction with regard to the need for amendment of the plaint.

22. The learned Trial Judge interpreted the statutory provision relating to amendment and observed that the object of using the expression "at any stage of proceedings" is for determining the real question of controversy between the parties. Though the order contained a general discussion about the nature and scope of Order VI Rule 17 of CPC., the learned Trial Judge appears to have made no attempt to consider as to whether amendment of this nature can be allowed.

23. The petitioners have taken up a contention before the Trial Court with regard to the change of cause of action. The said contention remain unanswered in the order passed by the learned Trial Judge.

24. The Supreme Court in **Ganesh Trading Company vs. Moji Ram, 1978 (2) SC 91** considered the question regarding introduction of a new or inconsistent cause of action through amendment of pleadings and observed thus:

"It is true that, if a plaintiff seeks to alter the cause of action itself and to introduce

indirectly, through an 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. But, mere failure to set out even an essential fact does not, by itself, constitute a new cause of action. A cause of action is constituted by the whole bundle of essential facts which the plaintiff 15 AIR 1961 SC 325 16 (1978) 2 SCC 91 must prove before he can succeed in his suit. It must be antecedent to the institution of the suit. If any essential fact is lacking from averments in the plaint the cause of action will be defective. In that case, an attempt to supply the omission has been and could sometime be viewed as equivalent to an introduction of a new cause of action which, cured of its shortcomings, has really become a good cause of action. This, however, is not the only possible interpretation; to be put on every defective state of pleadings. Defective pleadings are generally curable, if the cause of action sought to be brought out was not ab

initio completely absent. Even very defective pleadings may be permitted to be cured, so as to constitute cause of action where there was none, provided necessary conditions, such as payment of either any additional court fees, which may be payable, or, of costs of the other side are complied with. It is only if lapse of time has barred the remedy on a newly constituted cause of action that the Courts should, ordinarily, refuse prayers for amendment of pleadings."

25. There is one more contention taken by the petitioners while opposing the application for amendment. According to the petitioners, even after amendment, the plaint averments would proceed as if the firm is still in existence. There was no amendment with respect to the existing paragraphs as contained in the plaint originally filed, meaning thereby, the plaint at one place would proceed as if the plaintiff is a firm and at another place, it would appear as if it is a company. This aspect was also not considered by the learned Trial Judge.

### **Disposition**

26. For all these reasons, I am of the view that the matter

requires fresh consideration by the learned Trial Judge. In case, the matter is remitted, it would enable the parties to produce materials documents in support of their respective contentions. The learned Trial Judge would then be in a better position to appreciate the materials and pass a detailed order on merits.

27. In the result, the order dated 31 July 2015 is set aside. The application in I.A.No.141 of 2014 is restored to file.

28. The learned II Additional District Judge, Salem is directed to give reasonable opportunity to the parties to produce materials in support of their case, and dispose of the application in I.A.No.141 2014 on merits and as per law.

29. In the up shot, I allow the Civil Revision Petition. No costs. Consequently, connected miscellaneous petition is closed.

**28.11.2016**

Index : Yes  
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To

The II Additional District Court, Salem



**K.K.SASIDHARAN, J.**

(svki)

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