

HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

CIVIL REVISION PETITION No.1230 of 2016

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful respondent/defendant is directed against the orders dated 30th January, 2016 of the learned VI Additional District Judge, Kakinada, East Godavari District, passed in I.A.No.551 of 2015 in O.S.No.75 of 2010 filed by the petitioner/plaintiff under Order I Rule 10 read with Order VI Rule 17 and Section 151 of the Code of Civil Procedure, 1908 (hereinafter 'the Code' for brevity), requesting to permit her to implead the proposed respondents 2 and 3 as party-defendants 2 and 3 to the suit and make necessary consequential amendments to the plaint.

I have heard the submissions of Sri M.R.S.Srinivas, learned counsel for the defendant/revision petitioner ('defendant' for brevity) and Sri A.K.Kishore Reddy, learned counsel appearing for the plaintiff/respondent No.1 ('plaintiff' for brevity).

I have perused the material record.

The facts, which are necessary for consideration, in brief, are as follows:

The plaintiff brought suit against the defendant for a declaration that she is the owner of the suit schedule property by virtue of a Will, dated 14.12.1980, executed by her grand father, Peetha Lovaraju, whereunder, the suit schedule property was bequeathed to her with absolute rights after the death of one Pydamma. In the said suit she had also sought the relief of

recovery of possession of the suit schedule property from the defendant besides other reliefs including the relief of profits. The defendant filed a written statement and is resisting the suit. In the defence the defendant *inter alia* contended that the brother and sister of the plaintiff i.e., the proposed defendants are necessary parties to the suit and that the suit is liable for dismissal for non-joinder of the said parties who are necessary parties. After necessary issues were settled and the plaintiff was examined as PW-1, she filed the subject application for permission to implead her brother and sister who are co-legatees under the Will as defendants 2 and 3 and permit her to make necessary amendments to the plaint. The said petition was resisted by the defendant by filing a counter. On merits and by orders impugned in this revision, the trial Court allowed the petition. Therefore, the aggrieved defendant is before this Court.

The case of the plaintiff in support of her request in the said application, in brief, is this:

“Her grand father Peetha Lovaraju executed the Will, dated 14.12.1980; he died on 20.09.1994; on attaining majority, she came to know about the unlawful alienations made in respect of the property that was bequeathed under the Will; therefore, she brought the suit against the defendant for declaration and recovery of possession of the suit schedule property and other reliefs; she filed the suit without adding her brother and sister, who are co-legatees, by obtaining affidavits from them that the suit is being filed on their behalf also; since the defendant raised a contest that the suit is liable for dismissal for non-joinder of her brother and sister, the proposed defendants 2 and 3, as parties to the suit and as they are necessary

parties to the suit, she was advised to bring them on record as party-defendants 2 and 3; she could not implead them earlier as she is not aware of Court proceedings; they being co-legatees and beneficiaries under the Will, are necessary parties to the suit; there are no wilful laches on her part in not impleading them as defendants to the suit at the inception.

Per contra, the case of the defendant, in brief, is this:

The defendant filed a written statement denying the Will and also stating that the co-legatees of the plaintiff are necessary parties. The suit is liable to be dismissed for non-joinder of necessary parties. The proposed parties, who are none other than the brother and sister of the plaintiff, are very well aware of the proceedings from the year 2010 onwards. They had also participated in the partition suit. Hence, they are very much aware of the present suit proceedings. When PW-1/plaintiff was examined, she had admitted that she had not added her brother and sister as parties to the suit. Therefore, the contentions that she is not aware of the Court proceedings and that there are no wilful laches on her part in not impleading at the inception, her brother and sister as parties to the suit, are untenable contentions. The addition of proposed defendants, obviously, will change the entire nature of the suit and as such, the petition is liable to be dismissed.

At the hearing, the learned counsel for defendant would submit as follows:

The trial in the suit had commenced; the application for amendment is not maintainable; the trial Court proceeded to consider the application as one filed under Order VI Rule 17 of the Code ignoring the provision of law under

Order I Rule 10 of the Code and failed to consider the factual aspect regarding bar of limitation; the trial Court ought to have considered the defence of the defendant that the suit for declaration, if it were to be brought at this stage by the proposed defendants, would be barred by law of limitation. Therefore, the relief being sought to be claimed by way of the proposed amendment and the request for addition of parties are barred under law. The trial Court failed to take note of the fact that Order 1 Rule 10 (5) of the Code lays down that the proceedings as against any person added as defendant shall be deemed to have begun only after service of summons. The trial Court did not at all consider the said bar of limitation while passing the order impugned, and therefore, the order impugned in this revision is liable to be set aside.

In support of the contention in regard to bar of limitation, the learned counsel for defendant placed reliance on the decision of the Supreme Court in **Seenivasan v. Peter Jebaraj and another** [(2008) 12 SCC 316], wherein, the import of the above said provision of law was considered. He also placed reliance on the decision of the Supreme Court in **Amin Lal v. Hunna Mal** [AIR 1965 SC 1243] in support of the contention that a party can avail the provision under Order 1 Rule 10 of the Code subject to the law of limitation. Based on the ratios in the decisions he further contended that the application for amendment filed in the year 2015 in a suit of the year 2009 is barred by law of limitation, and that therefore, defendants 2 and 3 cannot be permitted to be impleaded.

Per contra, the learned counsel for the plaintiff, while supporting the orders of the Court below and while reiterating the pleaded case of the

plaintiff, which is already extracted supra, would submit as follows: “In the impugned order, the trial Court had noted that in the counter filed by the defendant, no plea in regard to bar of limitation was taken. The trial Court noted the circumstances in which the plaintiff was constrained to file the application for amendment of the plaint as well as for impleadment of the parties. The contention of the defendant that the trial Court failed to take note of the provision of Order 1 Rule 10 of the Code is incorrect, as in paragraph 10 of the impugned order, the trial Court extracted the provision of Order 1 Rule 10 (2) of the Code and considered the effect of the said provision while allowing the application filed by the plaintiff for impleadment of parties and consequential amendment of the plaint. The trial Court also held that in view of the provision of Order 1 Rule 10 of the Code, which lays down that a party can be impleaded at any stage of the proceeding, the bar under proviso to Order VI Rule 17 of the Code is not applicable in *stricto sensu*. In the facts and circumstances of the case, the order of the trial Court is right and justified and does not warrant interference.”

I have bestowed my attention to the facts and submissions.

Admittedly, the suit is based on a Will. The suit is filed for declaration, recovery of possession and profits and other reliefs. At the inception, the plaintiff did not implead the co-legatees under the Will, who are none other than her brother and sister, as parties to the suit. However, she filed their affidavits wherein they had stated to the effect that the suit is being instituted on their behalf also. The defendant had taken a specific defence that the suit is not maintainable and is liable to be dismissed for

non-joinder of necessary parties. PW-1 was also cross-examined on the said aspect. Thereafter, the plaintiff, *inter alia* contending that she was advised to implead the co-legatees as defendants 2 and 3, filed the subject application for permission to implead them as they are necessary parties and to permit her to consequently amend the plaint. It is not in dispute that even according to the defence, the said defendants are necessary parties being the brother and sister of the plaintiff and also co-legatees under the Will. The defence in the counter of the defendant is that the relief of impleadment of the defendants 2 and 3 is barred by law of limitation and that the present application is filed by the plaintiff after the cross-examination on the said relevant aspect only to get over the points gained by the defendant in the cross-examination of the plaintiff-PW1.

In this back drop it is necessary to refer to the provision of Order 1 Rule 10 of the Code, which reads as under:

“10. Suit in name of wrong plaintiff— (1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted thought a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms as the Court thinks just.

(2) Court may strike out or add parties.—The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name, of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended—Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the [116] Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”

A plain reading of the above provision shows that the Court has got jurisdiction and discretion to add a party at any stage of the proceeding either upon or without application of either of the parties to the suit in case the Court is of the opinion that the presence of such party before the Court may be necessary in order to enable the Court to effectively and completely adjudicate the *lis* and settle all questions involved in the *lis*. The Sub-rule (4) of the said Rule also ordains that where a defendant is added, the plaint shall be consequently amended. The crucial expression in Order 1 Rule 10 “only on the service of the summons” makes it abundantly clear that if any defendant is impleaded subsequently, proceedings as against such defendant shall be deemed to have begun only from the date of service of summons. There is no dispute with the settled legal position, which is reiterated in the decisions of the Supreme Court, relied upon by the learned counsel for defendant. Therefore, on the ground of bar under the proviso to Order VI Rule 17 of the Code, the petition cannot be dismissed. Further, the application of the plaintiff need not be rejected at the threshold on the ground of bar of limitation, more particularly, in the light of the fact that the issue of limitation is a mixed question of fact and law and has to be decided only after full-fledged trial along with other issues settled for determination in the suit. The learned counsel for the plaintiff submits that if it is also observed in

the orders of this Court that the trial Court shall take into consideration the provision of Order 1 Rule 10(5) of the Code and frame an appropriate issue on the bar of limitation, and the order of the trial Court is confirmed with the above observation, the ends of justice would be met. Be that as it may. In the case on hand the plaintiff is not claiming any reliefs against the proposed defendants, who are her brother and sister, and she is impleading them only to avoid the eventual dismissal of the suit on technical considerations and to enable the plaintiff to seek the reliefs claimed in the suit against the defendant (now 1st defendant) in their presence as the defendant had also raised a contention that they are necessary and proper parties to the suit. Hence, the bar of limitation may not arise at all in the instant suit.

Coming to the contention that the amendment of the plaint cannot be permitted after the trial has commenced before proceeding further, it is necessary to refer to the proviso to Order VI Rule 17 of the Code, which reads as under:

“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.”

It is profitable to refer to the following legal position also.

In **Usha Devi v. Rijwan Ahamd**¹ a contention was advanced that the trial of the suit would commence with the settlement of the issues; and, in support of the said contention that the framing of issues marked the commencement of the trial of the suit reliance was placed on the decision in **Ajendraprasadji N.Pandey v. Swami Keshavprakeshdasji** [(2006) 12 SCC1]. However, while meeting the said contention, the attention of the

¹ (2008) 3 Supreme Court Cases 717

Supreme Court was invited to the decision of the Supreme Court in **Baldev Singh v. Manohar Singh** [(2006)6 SCC 498] wherein it was held as follows:

“Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial Court. That apart, commencement of trial as used in proviso to Order VI Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order VI Rule 17 CPC which confers wide power and unfettered discretion on the Court to allow an amendment of the written statement at any stage of the proceedings.

Further, the Supreme Court having referred to a three-judge Bench decision in **Sajjan Kumar v. Ram Kishan**², had held as follows:

“Having heard the learned Counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial Court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial Court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the Plaintiff-Appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit.”

Thus in Usha Devi’s case (Supra), the Supreme Court, keeping in view of the decision in Sajjan Kumar (supra), held as follows:

“We may clarify here that in this order we do not venture to make any pronouncement on the larger issue as to the stage that would mark the commencement of trial of a suit but we simply find that the appeal in hand is closer on facts to the decision in Sajjan Kumar and following that decision the prayer for amendment in the present appeal should also be allowed.”

² (2005) 13 SCC 89

In the case on hand also, the trial has not yet concluded and only PW1 was examined. Therefore, in the well considered view of this Court, the facts of the present case are akin to the facts of the cases in the decisions in **Usha Devi, Baldev Singh and Sajjan Kumar** (supra). Therefore, the contention that the application seeking amendment of the plaint is barred under the proviso to Order VI Rule 17 of the Code is devoid of merit and needs no countenance. Viewed thus, this Court finds that the contentions of the defendant need no countenance.

On the above analysis, this Court finds that there is no merit in the revision and that the same is liable to be dismissed. The Civil Revision Petition is accordingly dismissed.

However, in view of the submissions of the learned counsel for the plaintiff, the trial Court is directed to frame an appropriate issue on the bar of limitation keeping in view the provision of Order I Rule 10(5) of the Code, if not already framed, and shall decide the said issue along with other issues after full-fledged trial. It is needless to state that in view of the addition of defendants 2 and 3, the trial Court shall also give the 1st defendant an opportunity to file additional pleading to meet the contentions stated in the consequential amendment of the plaint and also to raise any other contentions which the law permits.

There shall be no order as to costs.

Pending miscellaneous applications, if any, shall stand closed.

M. SEETHARAMA MURTI, J

7th December 2016
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