

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

Civil Revision Petition Nos.1043, 1090 and 1091 of 2016

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COMMON ORDER:

These civil revision petitions are filed against the docket orders dated 19.11.2015 passed by the Principal Junior Civil Judge, Kurnool, in IA.No.1378, 1377 and 1489 of 2015, respectively, in OS.No.475 of 2013.

2. The subject matter of the revision petitions being one and the same, they are heard together and are being disposed of by this common order.

3. The revision petitioner-plaintiff filed OS.No.475 of 2013 for grant of permanent injunction against the respondents-defendants stating that the suit schedule plot is allotted to her and when she was trying to erect a hut in her site, the respondents-defendants objected.

4. The case of the respondents-defendants is that the plaintiff was allotted Plot No.69, whereas she is erecting a hut in Plot No.70. It is their case that Plot No.70 was allotted to the mother of defendant No.2 under RC.A.No.513/2010, dated 04.10.2010 and since then they were enjoying the property with full rights and title over the schedule property. Though the plaintiff was allotted Plot No.69 on 12.08.2013, she came to Plot No.70 stating that it belongs to her. Hence, the respondents filed IA.No.835 of 2014 seeking to appoint an Advocate Commissioner for examining the site and take measurements of the site, and also to order the Mandal Surveyor to come with plan layout approval and fix the boundaries of Plot Nos.69 and 70. Subsequently, as the Advocate

Commissioner failed to file report, the Court below dismissed the I.A.No.835 of 2014.

5. Thereafter, the respondents-defendants filed IA.No.1377 of 2015 seeking permission to amend the written statement and also to file counter claim as per the petition schedule amendments.

The respondents-defendants also filed IA.No.1378 of 2015 and IA.No.1489 of 2015 seeking to recall PWs.1 to 3 for cross examination and to reopen IA.No.835 of 2014, respectively.

6. The petitioner-plaintiff who is the respondent in the aforesaid I.As. filed counter stating that the subject matter of the suit is Plot No.69, but whereas the petitioners are now seeking relief in respect of Plot No.70 which is not the subject matter of the present suit. It is further stated that counter claim, if any, has to be filed along with the written statement itself and that the counter claim must necessarily be in respect of plaint schedule property only. It is also stated that the written statement was filed long back and issues were framed and PWs.1 to 3 were also examined and the suit is now coming up for defendants' side evidence; and at this stage, the respondents-defendants are barred from filing counter claim and hence sought for dismissal of the interlocutory applications.

7. The trial Court, by its orders dated 19.11.2015, allowed I.A.Nos.1489 of 2015 stating that parties cannot be made to suffer for the mistakes of advocate and one more opportunity may be given to the defendants to prove their claim. With regard to I.A.Nos.1377 and 1378 of 2015, relating to amendment of written statement and recalling of PWs.1 to 3, the trial Court allowed the applications observing that the reasons assigned by the

defendants are satisfactory.

8. Aggrieved by the same, the present civil revision petitions are filed by the revision petitioner-plaintiff.

9. Learned counsel for the revision petitioner-plaintiff submits that when the evidence of PWs.1 to 3 was already closed and the suit is coming up for defendants' side evidence, the defendants cannot seek amendment of written statement. He also submits that the defendants have not assigned any reasons for seeking such an amendment at a belated stage. In support of his contention, the learned counsel relied on the judgments in ***N.Eshwara Prasad and others v. Margadarshi Chit fund Limited***^[1]; ***Sugesan and Co.Pvt.Ltd.,Madras v. Hindustan Machine Tools Limited., Hyderabad***^[2] and ***Smt.Amina Begum v. Ram Prakash***^[3].

10. On the other hand, learned counsel for the respondents-defendants submits that the trial Court, having been satisfied with the cause shown by the defendants, allowed the application for amendment of written statement and the same does not require interference of this Court. He also submits that the previous counsel for the defendants has not filed amendment and also has not taken steps for paying Advocate Commissioner's fee, and hence the defendants filed IA.No.1489 of 2015 seeking to reopen IA.No.835 of 2014.

11. In this case, it is to be seen whether the amendment sought for by the respondents-defendants can be allowed?

12. In I.A.No.1377 of 2015, the respondents-defendants have not

given any reason for amendment of the written statement, except stating that both parties are claiming ownership over the suit schedule property. The application was filed under Order VI, Rule 19 of the Code of Civil Procedure, 1908, which reads as follows;

“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 y 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.”

13. The respondents-defendants have not given any reason for seeking amendment of the written statement at a belated stage after completion of the evidence of PWs.1 to 3, nor the Court below has given any finding that the respondents in spite of due diligence couldn't seek amendment before commencement of trial. Further, the affidavit filed by the defendants is also vague.

14. Para 16 of the judgment relied on by the revision petitioner-plaintiff in **N.Eshwara Prasad (1 supra)** reads as follows;

“16. Turning to the facts in the instant case, the defendants 2 to 5 filed their written statement resisting the suit; issues were framed by the Court; the trial in fact had begun; the plaintiff led evidence and after closure of the evidence of the plaintiff, the suit had been coming up for the evidence of the defendants. Notwithstanding the fact that the claim by then was within the period of limitation, but the stage at which they sought to file is belated and therefore, the defendants cannot be permitted to file the counter claim at this stage. In that view of the matter,

although the reasons assigned by the Court below are different, but it is fairly and eminently a case where the defendants 2 to 5 cannot be permitted to lay the counter claim at that belated stage. For the foregoing reasons, the revision must fail.”

15. The ratio laid down in **N.Eswara Prasad (1 supra)** is squarely applicable to the present case as the facts are almost similar. In view of the same, the order dated 19.11.2015 passed by the Court below in I.A.No.1377 of 2015 is erroneous and the same is liable to be set aside and is, accordingly, set aside.

16. In view of setting aside of the order passed in IA.No.1377 of 2015, the question of recalling PWs.1 to 3 for further cross-examination for proving the counter claim does not arise and as such, order dated 19.11.2015 allowing I.A.No.1378 of 2015 is liable to be set aside and the same is set aside and accordingly I.A.No.1378 of 2015 is dismissed.

17. In a suit for simplicitor injunction, the burden lies on the plaintiff to prove his possession of the suit schedule property. In the case on hand, though the Court below allowed the application in I.A.No.835/2014 filed by the respondents-defendants seeking to appoint an Advocate Commissioner, the respondents-defendants were not diligent in paying the Advocate Commissioner's fee, thereby no report was filed by the Advocate Commissioner and as such the application was closed. Now, after completion of the evidence of PWs.1 to 3 and when the suit was coming up for defendants' side evidence, the respondents-defendants sought to reopen I.A.No.835 of 2014 by way of filing IA.No.1489 of 2015. This Court having set aside the order passed by the trial Court in I.A.No.1377 of 2015, and in view of the above facts sand

circumstances, I do not see any reason for appointment of Advocate Commissioner at this stage and hence I.A.No.1489 of 2015 is also liable to be dismissed and accordingly, order dated 19.11.2015 in I.A.No.1489 of 2015 is set aside.

18. Accordingly, all the three revision petitions are allowed. No order as to costs. Miscellaneous petitions, if any pending, shall stand closed.

A.RAJASHEKER REDDY, J

08.03.2016
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[\[1\]](#) 2004 (3) ALT 159

[\[2\]](#) 2004 (3) ALT 267

[\[3\]](#) AIR 1978 Allahabad 526