

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.5742 of 2015

ORDER:

This civil revision petition by the unsuccessful third party/proposed defendant under Article 227 of the Constitution of India is directed against the order dated 23.06.2015 of the learned I Additional Senior Civil Judge, City Civil Court, Hyderabad passed in I.A.no.1606 of 2012 in O.S.no.1437 of 2009 filed by the plaintiff under Order XXII Rule 4 read with Order 1 Rule 10 of the Code of Civil Procedure, 1908 ('the Code', for brevity) requesting to permit the petitioner to substitute 'Hindi Prachara Sabha, Hyderabad, represented by its present General Secretary at Hindi Prachara Sabha, Sriram Hindi Bhavan' in the place of the deceased defendant-Dhonde Rao Jadhav and to permit the plaintiff, in the interest of justice, to carry out the necessary consequential amendments as stated in the petition list.

2. I have heard the submissions of the learned counsel for the parties. I have perused the material record.

3. The case of the plaintiff in support of the request for substitution of the proposed defendant in the place of the deceased defendant, in brief, is this:

The suit is filed against the then General Secretary of Hindi Prachara Sabha, Hyderabad in his official capacity as he had obtained a loan from the plaintiff for construction of Hindi Prachara Sabha building at Hyderabad. Having obtained the said loan amount, i.e., the amount mentioned in the suit, he had issued receipts in his capacity as General Secretary, Hindi Prachara Sabha, Hyderabad. The suit is filed for recovery of the said amounts. During the pendency of the suit, the defendant had died. His death was intimated to the Court on 04.09.2012. Since the right to sue survives and the present General Secretary of the Hindi Prachara Sabha, Hyderabad, has succeeded as the Secretary and is functioning as the General Secretary of the Hindi Prachara Sabha, Hyderabad being the successor of the deceased, the proposed defendant is a necessary party to the suit for proper adjudication of

the suit. Therefore, the plaintiff had filed the instant petition to substitute the present proposed defendant in the place of the deceased defendant for proper adjudication of the suit.

4. The case of the proposed defendant, in brief, is this:

The proposed defendant is the Hindi Prachara Sabha, Hyderabad being represented by the deponent of the Counter affidavit, who is its General Secretary. The suit as framed is not maintainable either in law or on facts. The deceased defendant, late Dhonde Rao Jadhav, was arrayed in the suit as sole defendant in his personal capacity and not in the capacity of the General Secretary of Hindi Prachara Sabha, Hyderabad. The Hindi Prachara Sabha, Hyderabad is a registered society registered under the provisions of the Societies Registration Act. Therefore, on the death of the sole defendant, who was impleaded in his personal capacity, the proposed defendant-Hindi Prachara Sabha, Hyderabad cannot be substituted in his place by showing it as the legal representative of the deceased sole defendant. In the written statement filed by the sole defendant, it is pleaded that arraigning the sole defendant in his personal capacity is wrong and illegal and that the suit is liable for dismissal for mis-joinder of the parties. That written statement was filed as long back as on 21.07.2010. In spite of filing the written statement with such a defence, the plaintiff did not take steps to amend the plaint even after the cross-examination of the PW1. In the cross-examination of PW1, it was specifically suggested that the suit filed against the sole defendant in his personal capacity is not maintainable. The plaintiff having slept over his rights and without being diligent in prosecuting the matter has taken the death of the sole defendant as a ruse for substituting the Hindi Prachara Sabha, the proposed defendant as the defendant in the suit in the place of the deceased defendant. Therefore, the petition is liable to be dismissed. The plaintiff who had failed to amend the plaint during the life time of the sole defendant cannot be permitted to amend the plaint and substitute the proposed defendant i.e., Hindi Prachara Sabha, Hyderabad, represented by its General Secretary in the place of the deceased sole defendant. The allegation that receipts were passed by the deceased defendant in his capacity as General

Secretary of Hindi Prachara Sabha is denied. This deponent had succeeded to the post of the General Secretary of the Hindi Prachara Sabha on the death of the defendant is also incorrect. This deponent was elected as the General Secretary in the meeting of the Sanchain Samithi (Central Executive Committee) of the Hindi Prachara Sabha in a meeting held after the fresh elections. This deponent being the present General Secretary is not the legal representative of the deceased defendant. The allegation that the Hindi Prachara Sabha, Hyderabad is a necessary and proper party for adjudication of the suit is not correct. The petition is misconceived.

5. The trial Court having regard to facts and the circumstances and the pleadings of the parties had allowed the petition of the plaintiff and permitted the plaintiff to substitute the proposed defendant in the place of the deceased defendant. Therefore, the aggrieved proposed defendant had filed this revision petition.

6. The learned counsel for the proposed defendant while reiterating its defence in the interlocutory application had *inter alia* contended as follows:

The suit was brought against the deceased sole defendant in his individual or personal capacity. The deceased defendant was arrayed as a sole defendant. Order XXII Rule 4 of the Code has no application as the present proposed defendant is not the legal representative of the deceased defendant. Right to sue the proposed defendant does not survive on the death of the sole defendant. On the death of the sole defendant, who was arrayed in his personal capacity, such a defendant cannot be substituted with the present proposed defendant by permitting to name the proposed defendant as the legal representative of the deceased sole defendant. The order permitting the substitution of the defendant is passed erroneously without considering the factual and legal aspects. The deceased defendant in his personal capacity filed a written statement in the year 2010 itself and had pleaded in his defence that the suit instituted against the defendant in his personal capacity is not maintainable and is liable for dismissal for misjoinder of the party and non-joinder of the proper and necessary party. The

plaintiff was not diligent and had slept over his rights and did not take any appropriate steps to amend the plaint promptly and during the life time of the sole defendant. Taking the death of the sole defendant as a ruse, the plaintiff is making an attempt for substitution of the proposed defendant in the place of the deceased defendant. The proposed defendant is not the legal representative of the deceased sole defendant, who was impleaded in his personal capacity. The proposed defendant is a society registered under the Societies Registration Act and is a juristic person and it cannot be said that it is the legal representative of the deceased defendant. The provision of law stated in the petition is not applicable to the facts of the case. In the suit for recovery of money filed against the sole defendant in his personal capacity, a society cannot be impleaded by styling itself as the legal representative of the deceased defendant.

7. On the other hand, the learned counsel for the plaintiff had supported the order of the Court below after having read the contents of the plaint and the documents filed along with the plaint.

8. Before examining the merit of the matter, it is profitable to reproduce the provision of Order 1 Rule 10, which is as follows:

(1) Suit in name of wrong plaintiff - 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 through 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 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."

9. The plaintiff brought the suit against the sole defendant, Dhonde Rao Jadhav (since died), for recovery of money. In the plaint, the description of the said defendant is as follows:

**"Dhonde Rao Jadhav,
S/o late Hanumantha Rao
Aged about 81 years, Occ; General Secretary,
Hindi Prachara Sabha, Hyderabad.
Sriram Hindi Bhavan, L.N.Guptha Marg,
Station Road, Nampally,
Hyderabad-1."**

In the plaint, it is alleged that the defendant requested the plaintiff orally to arrange a loan of Rs.5,00,000/-for construction of Sriram Hindi Bhavan building, Hindi Prachara Sabha, Hyderabad and that the defendant had also addressed a letter dated 14.7.2006 subsequently to arrange the loan amount for construction of Sriram Hindi Bhavan, Hindi Prachara Sabha, Hyderabad and that accordingly, the plaintiff had advanced an amount of Rs.2,50,000/- in three installments viz., Rs.1,00,000/- vide receipt no.924, Rs.1,00,000/- vide receipt no.939 and Rs.50,000/- vide receipt no.973 to the Hindi Prachara Sabha, Hyderabad as loan for construction of the building, Sriram Hindi Bhavan of the Hindi Prachara Sabha, Hyderabad. It was further alleged in the plaint that inspite of demands, the amount was not repaid and that later, a demand notice was issued and that in the reply notice, the fact that the loan amount advanced was admitted, but a false plea of adjustment was taken and that therefore, the suit was brought.

10. Thus, a careful and meaningful reading of the plaint *prima facie* would show that the amount was advanced to the defendant in his capacity as General Secretary, Hindi Prachara Sabha, Hyderabad for construction of Sriram Hindi Bhavan of the said Sabha. In the written statement, the defendant had pleaded that the suit is bad for mis-joinder of parties. The specific defence of the defendant in this regard is that the suit for recovery of money filed against the defendant in his personal capacity is wholly misconceived and not maintainable in law and is liable to be dismissed *in*

limine since the suit transaction is done by the defendant in the capacity of General Secretary of Hindi Prachara Sabha, Hyderabad and on behalf of the said Sabha and not in his personal capacity. As rightly contended by the learned counsel for the proposed defendant inspite of filing a written statement with such a defence, the plaintiff did not take steps at the appropriate time for impleadment of Hindi Prachara Sabha, Hyderabad, i.e., the proposed defendant as a party to the suit. However, on the death of the defendant, the present application is filed for substitution of the deceased sole defendant with the proposed defendant, i.e., Hindi Prachara Sabha, Hyderabad represented by its General Secretary. Though in the plaint the name of the deceased sole defendant was mentioned, yet while describing the defendant, it is specifically stated that he is the General Secretary of the Hindi Prachara Sabha, Hyderabad. It is also averred in the plaint that money was borrowed for construction of the building i.e., Sriram Hindi Bhavan of the Hindi Prachara Sabha, Hyderabad. Thus, from the plaint averments, as rightly observed by the Court below, it is obvious that the amount was borrowed by the deceased defendant in his capacity as General Secretary, Hindi Prachara Sabha, Hyderabad. As noted by the trial Court, in the written statement, it is admitted that the defendant borrowed the amount in his capacity as General Secretary, Hindi Prachara Sabha, Hyderabad. In fact, in paragraph (5) of the written statement, it is averred as under:

“In reply to the contents of paragraph no.III(2) of the plaint, it is true that this defendant in the capacity of General Secretary of Hindi Prachar Sabha Hyderabad requested the plaintiff in his capacity as Correspondent of the said Training College at Kadapa, to extend interest free loan of Rs.5 lakhs in July, 2006 and June 2006 as alleged. However the said request was made through letter dated: 14.07.2006 in the capacity of General Secretary of Hindi Prachar Sabha Hyderabad and on behalf of the Sabha for requirement of building construction of Sri Ram Hindi Bhavan, while promising to repay the same by December, 2006.”
(Reproduced verbatim)

11. Thus, though Hindi Prachara Sabha, Hyderabad, the proposed defendant is not a legal representative of the deceased sole defendant, yet, the deceased sole defendant borrowed the amount in his capacity as General Secretary, Hindi Prachara Sabha, Hyderabad, is borne out by the plaint and the documents filed by the plaintiff and also the defence of the deceased

defendant. Therefore, the proposed defendant is a necessary and proper party to the suit cannot be disputed. In the facts and circumstances of the case, the trial Court having considered the pleadings in the plaint and the contentions advanced in the written statement of the deceased defendant had observed that the question as to whether the suit was filed against the defendant in his personal capacity or in his capacity as General Secretary representing Hindi Prachara Sabha, Hyderabad has to be considered not by looking merely at the cause title but by going through the entire plaint. The Court below had further observed that the said aspects will have to be finally and eventually considered while adjudicating the suit after full fledged trial, but not at the time of adjudicating the interlocutory application filed for substitution of the defendant. The trial Court had accordingly permitted the plaintiff to substitute the proposed defendant, i.e., Hindi Prachara Sabha, Hyderabad represented by its General Secretary in the place of the deceased defendant. As rightly observed by the Court below, the question as to whether the deceased defendant was impleaded in the suit in his personal capacity or in his capacity as the General Secretary, Hindi Prachara Sabha, Hyderabad, has to be adjudicated after full-fledged trial. Further, since the proposed defendant was permitted to be substituted as the defendant in the place of the deceased defendant by orders dated 23.06.2015 of the Court below, whether the suit against the substituted defendant would be barred by law of limitation is also a mixed question of fact and law and the same will have to be considered at the appropriate later stage by the trial Court while adjudicating the suit on merits. The said aspects need not be gone into at this stage in this revision where the orders of substitution of defendant are under challenge. The question as to whether on a meaningful reading of the plaint and the documents filed with the plaint it is possible to hold that the suit is filed against the defendant in his capacity as the General Secretary of the Hindi Prachara Sabha cannot be prejudged. And, while disposing of this subject interlocutory application the Court below has to examine whether a *prima facie* case is made out or not for granting the relief to the plaintiff as prayed for. Having gone through the plaint and the documents and the order of the Court below this Court is satisfied that the Court below is justified in

allowing the application of the plaintiff and that the well reasoned order of the Court below does not brook interference in the facts and circumstance of the case. Viewed thus, this Court finds that the order impugned does not call for interference.

12. Before parting with the case, it is apt to refer to the facts and the ratio in the decision in **Bal Niketan Nursery School v. Kesari Prasad**^[1]. The facts of the case show that an eviction proceeding was instituted by Bal Niketan Nursery School represented by Dr. Om Prakash. But, the appellant-school by way of an abundant caution filed a petition under Order 1 Rule 10 of the Code for amending the plaint for correcting the name of the plaintiff into Smt. Chandramukhi Ram Saran Shiksha Samiti by Secretary Om Prakash in place of the name of the Bal Niketan Nursery School by Manager Dr. Om Prakash.

Ultimately, the High Court quashed the order of eviction passed against the respondent by the Judge, Small Cause Court as confirmed by the Additional District Judge and remitted the suit to the trial Court for fresh consideration in the event of the trial Court allowing an application by the appellant under Order 1 Rule 10 of the Code for correcting the name of the plaintiff in the plaint. In the Civil Appeal before the Supreme Court, the question that fell for consideration was - 'whether the High Court erred in law in doing so?. The Supreme Court while considering the various contentions had held as under:

The last and final ground which needs setting out in some detail is that even if a rigid view is taken and it is to be held that the suits have not been instituted in the name of the proper person viz. the Society, the High Court should have seen that Order 1 Rule 10-has been expressly provided in the Civil Procedure Code to meet with such situations so that the rendering of justice is not hampered. The Rule provides that if a suit has been instituted in the name of a wrong person as plaintiff or if there is a doubt as to whether the suit has been instituted in the name of the right plaintiff the court may, at any stage of the suit, if it is satisfied that the suit has been instituted due to a bona fide mistake and that 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. The scope and effect of Order 1 Rule 10 has been considered in numerous cases and there is a plethora of decisions laying down the ratio that if the court is satisfied that a bona fide mistake has occurred in the filing of the suit in the name of the wrong person then the court should set right matters in exercise of its powers under Order 1 Rule 10 and promote the cause of justice. The courts have gone so far as to hold that even if the suit had been instituted in the name of a person who had no competence to file the suit, the courts should set right matters by ordering the addition or substitution of the proper plaintiff for ensuring the due dispensation of

justice. We may only refer to a few decisions in this behalf.

It was further held therein as under:

Having regard to this settled position of law the High Court ought not to have sustained the objection raised by the tenants regarding the competency of the appellant to file the suits and quashed the orders of eviction concurrently passed by the Small Cause Court and the Appellate Judge and remitted the suits for fresh consideration with directions to consider the merits of the application under order 1 Rule 10 CPC but should have itself allowed the petition and added the Registered Society represented by its Secretary Dr. Om Prakash who is already on record, also as a party and disposed of the writ petitions on their merits.

The ratio in the decision on an analogy is applicable to the facts of the case.

13. In the result, the Civil Revision Petition is dismissed.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M.SEETHARAMA MURTI, J

01st June, 2016
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