HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition No.3067 OF 2016

ORDER:

The 5th defendant in O.S.No.2869 of 2004 on the file of the V Senior Civil Judge, City Civil Court, Hyderabad, maintained by sole plaintiff against 15 defendants, impugning the order of the lower Court dated 11.04.2016 in I.A.No.271 of 2016 filed by the 3rd defendant for amendment of the written statement in paragraph-3, in relation to the so called gift deed executed by his late mother Smt. Ameena Begum, and late sister Smt. Ahasna Begum who died on 02.05.1994, much earlier to it a 21.07.1993 in their lifetime and pursuant to which he is entitled to 1/8th share of his mother i.e. 15/120th and 7/120th share of his sister in addition to his share of 14/120th in the suit property to say in all 36/120th in the plaint schedule and also to substitute 36/120th in the place of 14/120th in paragraphs 6 to 8 of the written statement and maintained the revision submitting that the ingredients of Order VI Rule 17 CPC, particularly the proviso to it amended in the year 2002 even not complied showing due diligence for allowing the amendment, that too, to introduce a new case which changes the character of the suit and trial Court should have seen that the revision 1st respondent/3rd defendant filed E.A.No.2265 of 2007 in E.P.No.598 of 2007 on the file of the 2nd Junior Civil Judge, City Civil Court, Hyderabad, alleging that he is the owner of the property bearing No.3-5-782/65/D&E and said claim petition was dismissed and against which C.M.A.No.148 of 2009 was filed and same was also ended in dismissal on 09.03.2016 and the 5th defendant/revision petitioner specifically stated in the counter affidavit before the lower Court that his sister and mother never executed any gift deed nor gifted any property to the 3rd defendant and the suit property is not matruka property and father of the deceased has already given half share to his wife in lieu of Mehar and she (mother of the parties) already orally gifted entire property to the revision petitioner/5th defendant on 15.06.2004 and also executed a memorandum of Hiba on 27.06.2004 and without considering the contentions, the lower Court erroneously allowed the application and thereby the order is liable to be set aside.

2.The learned counsel for the revision petitioner/5th defendant while reiterating the above grounds of revision submitted the arguments at length. Whereas, it is the submission of the learned counsel for the revision 1st respondent(petitioner in I.A.No.271 of 2016 covered by the impugned order of the lower Court ) that the order of the lower Court holds good, for this Court nothing to interfere by sitting in revision.

3. Heard and perused the material on record.

4. The affidavit averments for the amendments sought by the 3rd defendant before the lower Court covered by the impugned order in nutshell were that due to inadvertence, he could not bring to the notice of the learned counsel about the gift deed executed by his mother Smt.Ameena Begum on 21.07.1993 and by his elder sister Ahasna Begum in his name in respect of suit property and other properties and there is a condition in the gift that the donee shall allow his mother (first donor) to appropriate rents till her death and if donee violates said condition and transfers the property, gift automatically stands cancelled to revert back the property to the donors and being the donee he obliged to allow his mother to appropriate the rents from the property in her lifetime and he was given to understand that he will be entitled to claim the gifted property after death of his mother and under the said impression

in his written statement earlier he claimed the share of 14/120th in the suit property and as his mother died on 27.05.2011 and his sister on 02.06.1994 and both gifted on 21.07.1993, he will be entitled thereby 36/120th share so to amend. The 5th defendant/the revision petitioner contended that the mother and sister never gifted any property to the 3rd defendant much less as claimed and it is a created story and he filed E.A.No.2265 of 2007 in E.P.No.598 of 2007 supra claiming as owner of the property and went unsuccessful including in the C.M.A.No.148 of 2009 against the said claim before the IX Additional Chief Judge, City Civil Court, Hyderabad and thereby the false averments cannot be permitted to be looked into for once his mother and sister never gifted, question of alleging those as conditional gifts does not arise. His further contention is that the deceased father already given half share to his wife i.e. their mother in lieu of Matruka and she orally gifted the property in his favour of 15.06.2004 in the presence of sons and daughters and other relatives and later executed the memorandum of Hiba dated 27.06.2004 and the property is not matruka property, the question of any share to the petitioner does not arise thereby the amendment petition is liable to be dismissed.

5. The lower Court having referred the above pleadings observed from the respective contentions in allowing the application for amendment sought by the 3rd defendant that the High Court in Mechineni Chokka Rao Vs. Sattu Sattemma[1] and Donkada Vijayalakshmi Vs. Galla Sanyasamma[2] held that if proper explanation is offered, delay itself is not a ground to reject amendment and after commencement of trial even amendment can be allowed to avoid multiplicity of the proceedings and as no prejudice caused to the

[1] (2005) 3 Law Summary 301
[2] 2013 4 ALT 322

respondent and the proposed amendment neither changes the nature of the case nor brings out new plea, the respondents can be compensated by way of costs for delay in seeking amendment by its allowing in order to determine the real questions in controversy. In view of the rival contentions by the 5th and 3rd defendants supra, that too, the question of bar by limitation of the claim but for ultimate decision, does not arise at the stage of considering the amendment, though it is one of the contentions of the 5th respondent/5th defendant(Revision petitioner) of the claim is barred by limitation from the alleged gift on 21.07.1993. Pending suit any enlargement or relinquishment or extinguishment and limitation of shares of the parties in a suit for partition is a natural phenomena to consider from change of events and circumstances. The house property bearing D.No.3-5-782/65 is admeasuring about 400 sq.yards consisting of ground and first floor with mulgies situated at King Koti, Nampally Mandal, Hyderabad. Trial is also not commenced. The proposed amendment if allowed, the Court can effectively and completely adjudicate said lis and also put quietus to the lis on own merits in the factual matrix and from the legal position held entitled to the amendment.

6. In answering the revision against the impugned order, one of the contentions raised is under the guise of amendment sought along with the amendment application of the written statement, the 3rd defendant cannot be permitted to file any false documents to introduce. Undisputedly in this regard, the 3rd defendant did not take the plea in the original written statement of he is alleged donee of the gift deed dated 21.07.1993. It is not even a registered gift deed. Once it requires registration, if it is from the contents of the document, the gift is contemporaneous and not mere acknowledgment of a past oral

transaction and the same thus requires stamp and registration. Though oral gift under Muslim Personal uncodified law is valid and known as hiba; the requirements for that are open declaration in the presence of witnesses and giving and acceptance which are the mandatory requirements as held in Hifazath Hussain Vs. Sadiq Hussain[3]. In this regard, in the amendment petition affidavit or in the proposed amendment there is no any specific plea to satisfy the legal requirements. No doubt these are the matters that are required to be adjudicated in the suit. Thus such a contention disputing the genuineness of any such gifts are thereby left open. By allowing the amendment, definitely any additional written statement and rejoinder to the plaint, the other parties to the lis automatically are entitled to file even in this regard.

7. The other contention is that with the application for amendment, the documents cannot be received. What Order VIII Rule 1(A) of C.P.C. contemplates is filing of the documents in custody of the party with the written statement. No doubt under the guise of amendment of written statement, he cannot file the document which he did not earlier file, but for to file with a separate application invoking Order VIII Rule 1(A) C.P.C. to receive or not, to decide on own merits from rival contentions of said document in question is a fabricated or genuine or so to decide from the belated filing concerned from the decisions placed reliance of Voruganti Narayana Rao Vs. Bodla Rama Murthy[4] and Ravi satish Vs. Edala Durga Prasad[5]. Thus it is premature to go into that aspect of genuineness of the document for beyond the scope of revision but for to say the alleged gift document cannot be

[3] (2016) 4 ALT 323
[4] (2011) 6 ALT 299
[5] 2009 3 ALT 236

received with proposed amendment petition but for to decide it filed with a separate application to receive the document under Order VIII Rule 1(A) of C.P.C.

8. Coming to the contention of so called gift, original has to be filed and the same is liable for stamp duty to impound concerned, at the time of filing and receiving if at all by allowing the document to receive for marking, such a question is left open to decide by trial Court, for that is also premature at this stage to go into.

9. Now so far as the contention of the 5th defendant revision petitioner of his mother already gifted the property to him on 15.06.2004 and executed on 27.06.2004 memorandum of Hiba concerned, it is also left open to him to raise such a plea in the additional written statement to be filed to oppose the amended plea of the 3rd defendant, so also the other contention of the 3rd defendant went unsuccessful in the claim maintained E.A.No.2265/2007 E.P.No.598 of 2007 and the C.M.A.No.148 of 2009 against it also for the relevancy therefrom if at all for the trial Court to consider and ultimately to decide genuineness of the gifts. The lower Court is thus rightly observed in this regard that it is premature to go into of ultimate proof of the gift in allowing the amendment.

10. So far as due diligence is concerned, the approach in construing due diligence once trial is commenced even is liberal. It is observed by trial Court that trial is not commenced. Even taken trial is commenced and due diligence requires from Order VI Rule 17CPC, and that explanation accepted with liberal approach by the trial Court by observing that such a plea to permit is to give quietus to lis and thus left

open for adjudication of the lis from that plea also for deciding on own merits, including any legal bar to the amended plea. Thus impugned order of the lower Court no way requires interference, but for to say for the belated claim of amendment though delay itself is not a ground to reject as held by this Court in considering the scope, in the recent expression in Smt. Mareddy Seetharathnam vs Siruvuri Venkatarama Raju[6] C.R.P.No.1751 of 2016 and batch. The trial Court, no doubt, should have been allowed the amendment subject to costs.

11. Accordingly and in the result, from the above discussion, the revision is disposed of while confirming the order of the lower Court, however, with costs of Rs.3,000/-(Rs.1500/- each to the 5th defendant and plaintiff) which is without prejudice to contest of both sides, to file any additional written statement and plaint rejoinder to the said amended plea of the D.3, including by the revision petitioner/5th defendant in the additional pleadings for ultimate decision. It is made clear that with the petition for proposed amendment to the written statement of D.3, he cannot file the so called gift deed of 1993 but for with a separate application under Order VIII Rule 1(A) of C.P.C. to decide on own merits to receive, including on any requirement of stamp duty and registration and if unregistered if on duly stamped, if at all to consider therefrom only to exhibit for any collateral purpose.

12. Consequently, miscellaneous petitions, if any, shall stand closed. No costs.

Dr. B. SIVA SANKARA RAO, J

Dt.15.11.2016

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[6] (2016) 3 ALT 655