

HON'BLE SRI JUSTICE G. SHYAM PRASAD

CIVIL REVISION PETITION No.4744 OF 2016

ORDER:

1. This Civil Revision Petition is arising out of the order, dated 11.08.2016, in Interlocutory Application No.712 of 2016 in Original Suit No.1 of 2007 on the file of the Special Judge for trial of cases under Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act-cum-Additional District and Sessions Judge, Vizianagaram (For short, 'the trial Court') .

2. The revision petitioner herein is the petitioner in Interlocutory Application and plaintiff in the Suit before the trial Court. She filed the suit against the respondents herein for specific performance of agreement of sale, dated 16.10.2004; she filed the instant application therein, under Order VI Rule 17 of C.P.C. read with Rule 28 of Civil Rules of Practice, for amendment of the plaint.

3. The application was dismissed by the trial Court mainly on three grounds; firstly, that the suit was filed in the year 2007 and the application for amendment of the plaint was filed in the year 2016 and, hence, it is belated; secondly, the claim of the petitioner for partition of ancestral property is not maintainable as the co-sharers *i.e.*, respondents 2 to 12 are not the signatories of the agreement of sale; thirdly, that the proposed amendment sought by the petitioner is after commencement of trial, which is not permissible in view of amendment to C.P.C. in the year 2002.

4. Being aggrieved by the impugned order, from dismissing the application for amendment of the plaint, the revision petitioner has preferred this Revision.

5. The points that arise for consideration in this matter are:

1. Whether the revision petitioner-plaintiff is entitled to seek for amendment of the plaint?

2. Whether the order passed by the trial Court suffers with any illegality or perversity?

6. The brief facts of the petition are that the revision petitioner is the plaintiff who has filed a suit in O.S. No.1 of 2007 on the file of the Court of Principal District Judge, Vizianagaram. The specific performance of agreement of sale was dated 16.10.2004. She sought for an alternate relief of refund of amount in respect of plaint schedule property along with the main relief in the suit. The trial was commenced in the suit. The contention of the revision petitioner is that the subject matter of the suit is a joint family property. The respondents 2 to 12 are the co-sharers of the joint family property. Respondents 13 to 15 herein are the legal heirs of some of the defendants, who died during pendency of the proceedings, before the trial Court. Therefore, the revision petitioner sought for partition of the schedule property among the co-sharers and for separate possession of her share. She sought for partition to avoid multiplicity of proceedings and therefore, she has impleaded the respondents 2 to 15 as the co-sharers of the schedule property though they have not executed the agreement of sale. The trial Court, on consideration of the contentions raised by the

respondents in the application that the suit is of the year 2007 and the petitioner has impleaded the alleged co-sharers as parties though they did not execute the agreement of sale, amendment sought for by the petitioner is after commencement of the trial, held that in view of the amendment to C.P.C. in 2002, the petitioner is not entitled to seek for amendment of the plaint, after commencement of the trial and after framing of the issues, relying on the decisions of the Apex Court in *A. Abdul Rashid Khan (dead) and others Vs. P.A.K.A. Shahul Hamid and others*¹, *P.C. Varghese Vs. Devaki Amma Balambika Devi and others*² and *Vidyabai and others Vs. Padmalatha and another*³ dismissed the application for amendment of the plaint.

7. In the instant case, the co-sharers brought on record as defendants 2 to 15 are not the parties to the agreement of sale. The relief sought is for amendment of the plaint in a suit filed for specific performance of agreement of sale and partition of the schedule property. This is not a case where the purchaser of the property is seeking for partition of the schedule property. The petitioner-plaintiff is seeking for partition among the co-sharers claiming that it is joint family property.

8. A perusal of the impugned order would reveal that the application for amendment is not maintainable after commencement of the trial in a suit. Admittedly, the suit was filed in the year 2007 and the instant application for amendment of the

¹ MANU/SC/2734/2000

² MANU/SC/1085/2005

³ (Civil Appeal No.7251/2008, dt.12.12.2008)

plaint was filed in the year 2016, by which time the trial of the suit has already commenced. Hence, at this stage, seeking amendment of the plaint does not appear to be probable and just. It is pertinent to note that defendants 2 to 15 are not the parties to the agreement of sale executed by the revision petitioner in favour of 1st respondent. They were brought on record as subsequent defendants in the suit without seeking for any amendment. At this belated stage it is not appropriate to consider the amendment of the plaint seeking the relief of partition of plaint schedule property.

9. It is also appropriate to consider that the petitioner has sought for specific performance of agreement of sale and in alternate refund of the earnest money. Unless the suit for specific performance of agreement of sale is decreed, partition of the property among the co-sharers would not arise at all.

10. Unless the petitioner is definite about her share in the property, and unless she had absolute rights over the property, she cannot sell the property. Even if it is presumed that she had a share in the joint family property, she cannot sell the same unless she knows the extent of share she had in that property. The petitioner without knowing the extent of her share in the joint family property cannot claim any right over the said property. If the petitioner sells her undivided share in the property and, subsequently, sought for partition and allotment of her share, it may some times leads to multiplicity of the proceedings. The rights of the petitioner would not mature unless she knows entitlement of her undivided share and the extent of share, if any. Even if partition is effected, unless she is put in

possession of her share of the property, she cannot claim rights over that property.

11. In *Abdul Rashid*¹, the Apex Court held as follows in Para 16:

“16. So far the other part of the High Court's order by which it decreed the alternative relief of Respondent No.1 for partition of the suit property in six equal share by metes and bounds and delivering separate possession over these such shares, on the face of it is erroneous and cannot be sustained, in a suit for specific performance. The vendee on the date of filing this suit has yet not become the owner of this property, as he merely seeks right in the said property though the decree of specific performance. When the sale deed itself has yet to be executed, whose right in the property has yet not matured, how can he claim partition and possession over it? Even after decree is passed, his right will only mature when he deposit the balance consideration and the sale deed is actually executed. This apart how could be any partition in the property, without other co-sharer joining, who are not part of the disputed agreement. No issue is framed between them. No evidence led. Hence, we find that the High Court was not right in decreeing this alternative prayer of partition in this suit.”

12. In *Abdul Rashid*¹, the Apex Court held that a decree for partition cannot be granted in a suit for specific performance of agreement of sale where the co-sharers are not the parties to the agreement of sale. In the light of the decision referred *supra*, the petitioner is not entitled to seek amendment of the plaint.

13. In *P.C. Varghese*², the Apex Court held as follows in Para 36:

“36. Before parting with this case, however, we may observe that the manner in which the decree has been passed by the learned Trial Court is open to question

inasmuch as a relief in terms of Section 22 of the Specific Relief Act being incidental or ancillary; to the main relief of specific performance of contract and, furthermore, being in addition thereto, ordinarily, a proceeding for grant of a final decree for partition should be initiated after the sale deed in terms of the decree for specific performance of contract is executed and registered and not vice-versa.”

14. Learned counsel for the petitioner vehemently contended that in terms of Section 22 of the Specific Relief Act, 1963 (for short, ‘the Act’), the revision petitioner cannot seek the relief of partition but, in the light of the above decision, the relief in terms of Section 22 of the Act is independent or ancillary to the main relief of specific performance of contract. It was clearly held that a proceeding for grant of a final decree for partition should be initiated after the sale deed in terms of the decree of specific performance of contract is executed and registered and not *vice-versa*. The trial Court had properly relied upon the decisions referred to by the respondents and rightly dismissed the application for amendment of plaint on the ground that the suit for specific performance of contract is the main relief and the relief of partition is an independent or ancillary relief. Unless a decree for specific performance is passed, the question of partition does not arise.

15. In *Vidyabai*³, the Apex Court referred to its earlier decision in *Salem Advocates Bar Association Vs. Union of India*⁴, wherein it was held as follows in Para 43:

43. Under the proviso no application for amendment shall be allowed after the trial has commenced, unless in spite of

⁴ 2005 (6) SCC 344

due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order 6 Rule 17 was due to the recommendation of the Law Commission since Order (*sic* Rule) 17, as it existed prior to the amendment, was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of courts and, therefore, by the Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognising the power of the court to grant amendment, however, with certain limitation which is contained in the new proviso added to the rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

16. The trial Court has rightly placed reliance on the decisions cited by the respondents and dismissed the application for amendment of the plaint, keeping also in mind the amendment of C.P.C. in 2002. In the instant case, the petitioner has not brought on record any satisfactory reasons for not moving the Court for amendment of the plaint, prior to commencement of trial. Hence, I do not see any valid ground to defer with the order passed by the trial Court.

17. In view of my foregoing discussion, the Civil Revision Petition fails and is, accordingly, dismissed.

18. As a sequel, miscellaneous petitions, if any, pending, shall stand dismissed as infructuous. No order as to costs.

G. SHYAM PRASAD, J

Date: 20.12.2016.
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HON'BLE SRI JUSTICE G. SHYAM PRASAD

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