

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1450 of 2017

ORDER:

The unsuccessful petitioners/ defendants filed this revision, under Article 227 of the Constitution of India, assailing the orders, dated 17.01.2017, of the learned Junior Civil Judge, Guntakal, passed in I.A.No.260 of 2016 in O.S.No.74 of 2011.

2. I have heard the submissions of *Sri M. Ganga Rao*, learned counsel for the petitioners/ defendants (hereinafter, 'defendants'), and of *Sri B. Vijaya Bhaskar*, learned counsel appearing for the 1st respondent/ plaintiff (hereinafter, 'plaintiff'). I have perused the material record.

3. To begin with, it is to be noted that the plaintiff filed a suit for specific performance of a contract of sale, dated 22.04.2002, and for perpetual injunction and for other reliefs. The 2nd defendant is the son of the 1st defendant. The 3rd defendant is the brother of the 1st defendant. The defendants 4 and 5 are the sons of the 3rd defendant. On the death of the 1st defendant, his wife and daughters were brought on record as defendants 6 to 10. On the death of the 3rd defendant his wife was also brought on record as the 11th defendant. The 1st defendant filed a written statement. The defendants 2 to 5 filed a memo adopting the written statement filed by the 1st defendant (since died). Thereafter, the defendants 2 to 10 filed the afore-stated interlocutory application under Order VIII Rule 9 read with Section 151 of the Code of Civil Procedure, 1908, requesting for permission to the 5th defendant to file additional written statement. The said petition was resisted by the plaintiff by filing a counter. On merits and by the orders impugned in the revision, the trial Court dismissed the petition of the defendants and

refused to grant permission to the 5th defendant to file additional written statement on the ground that the defendants 2, 4 to 10 cannot take a defence, which is at variance with the defence already taken by the deceased 1st defendant and that they cannot seek amendment of the written statement filed by the deceased 1st defendant. Aggrieved thereof, the defendants 2, 4 to 10 preferred this revision petition.

4. While reiterating the case pleaded by the defendants, learned counsel for the defendants 2, 4 to 10 would submit as follows: "The 5th defendant is representing all the defendants 2, 4, 6 to 10. He is the son of the deceased 3rd defendant. His mother is impleaded as 11th defendant. The 1st defendant during his life time filed a written statement in the suit. The other defendants 2 to 5 adopted the said written statement of the 1st defendant. In the plaint, this defendant's age was mentioned as 30 years. He was born on 20.05.1986. The alleged suit agreement of sale is false and it is not executed in favour of the plaintiff. On the date of alleged agreement of sale, this 5th defendant was a minor. The said fact was suppressed. The suit based on the alleged agreement of sale, therefore, is not maintainable. In the written statement filed by the 1st defendant, the afore-stated plea is not taken. Hence, filing of additional written statement is important to prove the case of the defendants. The trial Court erroneously dismissed the petition holding that the defendants cannot seek amendment of the written statement filed by the deceased 1st defendant. The defendants 2, 4 to 10 are not seeking amendment of the written statement already filed by the deceased 1st defendant. They are only seeking permission for the 5th defendant to file additional written statement and to enable the defendants 2, 4 to 10 to take the plea that the 5th defendant who is son of the deceased 3rd defendant is a minor as on the date of the agreement of sale and that therefore, the agreement of sale is unenforceable and the suit is not maintainable. In the facts and circumstances of the case,

the Court below ought to have granted permission as sought for by the said defendants and ought to have received on file the additional written statement filed by the 5th defendant along with the petition. The order impugned is unsustainable and is liable to be set aside.”

5. Per contra, learned counsel for the plaintiff while supporting the orders impugned would submit that the suit is filed for specific performance of a contract of sale executed by the defendants 1 to 5 in favour of the plaintiff. The 5th defendant is the son of 3rd defendant and that on the death of the 3rd defendant, the defendants 4, 5 and 11 were brought on record and that on the death of the 1st defendant, his legal representatives were brought on record as defendants 6 to 10.

6. The 1st defendant filed a written statement stating *inter alia* as follows:

“The allegations in paragraph 3 of the plaint that defendants 1 and 3 along with their children, who are the defendants 2, 4 and 5, executed the document dated 22.04.2002 in favour of the plaintiff agreeing to sell the suit schedule property for Rs.70,000/- after receiving the total sale consideration and that the defendants have delivered possession of the said land to the plaintiff on the same day are denied as false and the plaintiff is put to strict proof of the said allegations. Omkarappa is the close friend of plaintiff. Plaintiff and Omkarappa colluding together created nominal documents in order to deprive the rights of this defendant and other co-owners of the suit schedule property. The sale mentioned in paragraph 3 of the plaint in favour of Omkarappa by plaintiff is a nominal transaction and no consideration was passed and there is no delivery of possession of the property in favour of the said Omkarappa.”

7. It is borne out by the record that the said written statement was filed by the 1st defendant on 09.11.2011 and that the defendants 2 to 5 adopted the said written statement filed by the 1st defendant. Thus, the 5th defendant also adopted the defence that was stated in the written statement of the deceased 1st defendant. Now the 5th defendant seeks permission to file an additional written statement only to enable him and the other defendants to contend that he was born on 20.05.1986 and that he was a minor as on the date of the suit contract of sale, dated 22.04.2002, which was alleged to have been signed by him also. Learned counsel for the plaintiff submits that the execution of the suit agreement of sale was denied by the 1st defendant in his written statement, which was adopted by the defendants 2 to 5. In the light of the defence taken by the 1st defendant that the suit contract of sale is not executed by the executants including the 5th defendant and as the same defence was adopted by the defendants 2 to 5 and as the proposed defence, which the 5th defendant intends to take in the additional written statement, is an alternate defence to the effect that the 5th defendant was a minor as on the date of the alleged suit contract of sale, this Court finds that the 5th defendant can be permitted to file an additional written statement. As the execution of the suit agreement of sale was already denied by the defendants 1 to 5, the proposed defence if permitted will not alter the defence and it cannot be said that the defendants are withdrawing an admission in the defence already taken in the written statement already filed. In *Usha Balashaheb Swami and others v. Kiran Appaso Swami and others*¹ it is held that it is well settled principle that a prayer for amendment of the plaint and a prayer for amendment of written statement stand on different footings and that the general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of the claim applies to amendments to plaints and it has no counter part in the principles relating to amendment of

¹ (2007) 5 SCC 602

written statements and that, therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding or altering or substituting a new cause of action in the plaint may be objectionable. Therefore, if the 5th defendant herein is permitted to file an additional written statement to enable him to take an additional plea/ alternative plea that is not taken in the written statement of the deceased 1st defendant, which was adopted by him, the said course not only sub-serves the ends of justice but is also permissible in view of the precedential guidance and the facts and circumstances of this case. Hence, this Court considers that the request for filing additional written statement by the 5th defendant merits consideration in the facts and circumstances of the case.

8. On the above analysis, this Court finds that observations and findings in the order impugned of the trial Court are not sustainable and that therefore the said order calls for interference.

9. In the result the revision petition is allowed and the order, dated 17.01.2017, of the learned Junior Civil Judge, Guntakal, passed in I.A.No.260 of 2016 in O.S.No.74 of 2011 is set aside and the said interlocutory application is allowed and the additional written statement filed by the 5th defendant is received on file. The trial Court shall now give an opportunity to the plaintiff to file additional pleading in reply to the additional written statement of the 5th defendant and then take up further proceedings in the suit as per the procedure established by law.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, shall stand closed.

05.09.2017
RAR

M. SEETHARAMA MURTI, J

Learned counsel for the plaintiff submits that the execution was denied by the 1st defendant. In the light of the defence taken by the 1st defendant that the suit contract of sale is not executed by the executants including the 5th defendant and as the same defence was adopted by the defendants 2 to 5 and as the defence, which the 5th defendant intends to take in the additional written statement is an alternate defence, this Court finds that the 5th defendant can be permitted to file a an additional written statement.

