

HONOURABLE SRI JUSTICE A. SHANKAR NARAYANA

CIVIL REVISION PETITION No.5093 OF 2016

ORDER:

The present Civil Revision Petition is filed assailing the order dated 28.9.2016 in I.A. No.156 of 2015 in O.S. No.406 of 2007 on the file of Principal Junior Civil Judge at Nizamabad.

2. The revision petitioner is the 4th defendant in the suit and he filed the aforesaid I.A. under Order 8 Rule 9 read with Section 151 of the Code of Civil Procedure, 1908 (for short, 'Code') seeking leave to file an additional written statement.

3. The first ground on which he sought leave is that his father was originally arrayed as 2nd defendant and on his death he came on record as one of the legal representatives, but, somehow, he could not file an additional written statement within stipulated time and as such he was set *ex parte*. When he became unsuccessful in getting *ex parte* order passed against him set aside, he approached this Court in C.R.P. No.2727 of 2015. By order dated 17.7.2015, the same was allowed setting aside *ex parte* order passed against him. Opining that the development that took place subsequent to the death of his father has to be brought to the notice of the Court, he filed an additional written statement requesting leave.

4. Resisting the request, counter was filed by the 1st respondent/plaintiff raising preliminary ground that all the parties to

the suit are not made as parties; the defendant has no right to file additional written statement deviating the pleadings put forth by the deceased first defendant and the facts which were not pleaded by the deceased, first defendant cannot be altered by way of additional written statement.

5. The petitioner, after the Civil Revision Petition was allowed, filed an application to amend the written statement filed by the deceased first defendant, but the same was dismissed by the learned Junior Civil Judge and when he filed Civil Revision Petition challenging the said order, this Court disposed of the said Civil Revision Petition with an observation to file rejoinder as per Order 8 Rule 9 of C.P.C. if permissible under law on the facts of the present case and, therefore, the petitioner herein has to file rejoinder but not additional written statement, that too without deviating the pleadings put forth by the deceased first defendant, but the contents of the additional written statement now sought to be filed would show that the petitioner is altering the pleadings taken by the deceased first defendant which is impermissible under law. Thus, according to the first respondent, the petitioner is acting against law and against the order passed by this Court by coming forward to submit additional written statement seeking leave, which cannot be allowed and, therefore, sought to dismiss the petition.

6. The learned Junior Civil Judge has observed that the petitioner claimed that the suit schedule property was allotted to his

share and evidencing the said transaction, a registered release deed, was executed by his family members on 14.3.2013 and since his father died during pendency of the suit, he intended to project it. The learned Junior Civil Judge has also observed that the record revealed that the suit has been coming up for disposal since the year 2007, though, the relief claimed is perpetual injunction simplicitor and evidence on behalf of plaintiff was completed and coming up for the defendant's evidence.

i) The learned trial Court referring to the object of Order VIII Rule 9 of the Code, which confers a restrictive right on the parties to present additional written statement or additional pleading as not an absolute right, and Court has to exercise granting permission having regard to the Order VII Rule 7 of the Code, and referring to the ruling in **Gajraj v. Sudha and others**¹, rendered by the Hon'ble Supreme Court for the proposition that a legal representative substituted cannot set up a new or individual right, and he cannot take up a new and inconsistent plea contrary to the one taken by the deceased, and the proposed LRs stand in the shoes of the deceased defendant and must accept their position adopted by their predecessor and observing that the revision petitioner has come up with a new pleading deviating the defence set up by the deceased defendant No.1 giving a go-by to the written statement filed by the deceased defendant No.1 and the pleading taken in the additional written statement is not consistent

¹. (1999) 3 SCC 109

with the pleas taken in the original written statement, and if permitted, the same would alter or add new facts to the pleadings, which were conspicuously missing in the original written statement and would completely change and complicate the litigation, and acceptance of additional pleading consequently leads to fresh evidence and such fresh evidence is not permissible to bring on record at belated stage, dismissed the petition.

7. Heard Sri Azim Parbatani, learned counsel for the revision petitioner - defendant No.4, and Sri Gaddam Srinivas, learned counsel for respondent No.1 - plaintiff. Despite service of notice on respondent Nos.3 to 5, none appear.

8. The submissions made by the learned counsel for the revision petition have been that in view of the change in the events subsequent to the institution of suit and filing of the written statement by the deceased defendant No.1, the revision petitioner herein is constrained to file additional written statement to project the change in the events; since the release deed was executed by rest of the family members in favour of the revision petitioner, and vested with the title and possession over the property covered by the release deed, the revision petitioner is duty bound to bring it to the notice of the Court by filing additional written statement and, therefore, leave is sought.

i) It is according to him, that in a suit for perpetual injunction, the whole burden to prove possession over the suit property and, of

course, incidentally title, wholly rests on the plaintiff and, therefore, the trial Court was not right in rejecting the request and, somehow, went wrong in viewing that right is a restricted right and subject to the power of the Court to be exercised under Order VII Rule 7 of the Code. Of course, he has not relied on any rulings, but his submission is that this Court while disposing of C.R.P. No.5064 of 2015, dated 19.01.2016, preferred against the order, dated 29.09.2015, in I.A. No.634 of 2015 in O.S. No.406 of 2007, passed by the Principal Junior Civil Judge, Nizamabad, filed under Order VI, Rule 17 read with Section 151 of the Code, held that the revision petitioner is entitled to bring the subsequent events to the notice of the Court by following necessary procedure contemplated under Order VIII Rule 9 of the Code subject to the entitlement as per law. The learned Single Judge of this Court did not withhold the order, observing that amendment can be allowed after commencement of the trial, only when the petitioner is able to establish that he exercised due diligence, despite it he did not take any steps to get amended. But, since the alleged partition etc. is a subsequent event, such event can be brought on record by following Order VIII Rule 9 of the Code, but not under Order VI Rule 17 of the Code, and on that ground, the said petition was not maintainable, and observing that at best it is open to the revision petitioner to file a petition under Order VIII Rule 9 of the Code to bring the subsequent events on record after obtaining leave of the Court as required under Order VIII Rule 9 of the Code. Therefore,

the learned counsel would seek to set aside the order by allowing the revision petition.

9. Counter affidavit is filed by respondent No.1 - plaintiff opposing the request, but it is unnecessary to refer to the averments of the counter affidavit for the reason he has extracted some portions of the order passed by the trial Court and sought to dismiss the revision petition.

i) The learned counsel for respondent No.1 placed reliance in **Gajraj¹** and **P.A. Jayalakshmi v. H. Saradha and others²**. In **Gajraj¹**, the Hon'ble Supreme Court was dealing with an application under Order XXII Rules 2 and 5 of the Code and Order I Rule 10 of the Code. The fact-situation therein would show that legal representatives initially laid the petition under Order I Rule 10 of the Code raising contention to agitate their individual rights and the applications filed more than once were dismissed. The trial Court therein observing the same, and the scope of Rule 5 of Order XXII of the Code further observing that the proposed legal representatives cannot take up all other defences arising from their individual rights which the High Court did not agree, and the Hon'ble Supreme Court holding that the legal representatives on earlier occasions moved the Court under Order 1 Rule 10 of the Code, but failed and, therefore, allowed the appeal setting aside the order of the High Court. This ruling, of course, may not render assistance to the 1st respondent for

². (2009) 14 SCC 525

the reason similar situation is not occurring in the present case. In fact, in the present revision petition, the revision petitioner herein earlier filed an application in I.A. No.634 of 2015 under Order VI Rule 17 read with Section 151 of the Code to amend the original written statement filed by the deceased defendant No.1, who is no other than the father of the revision petitioner herein. When he was unsuccessful, he approached this Court by filing C.R.P. No.5064 of 2015, and this Court while confirming the order, however, has given liberty as mentioned hereinabove. What has been observed by this Court in the said revision petition i.e., C.R.P. No.5064 of 2015, has been contained in paragraph Nos.20 to 22 thus:

“20. In view of the principles laid down in the above judgments, the Courts have to allow amendments if petitions under Order VI Rule 17 of CPC are filed before commencement of trial. If petitions are filed after commencement of trial, the petitioners have to show that amendment petition could not be filed in spite of exercise of due diligence. Here, the petitioner explained the reason for his failure to amend the plaint, more particularly based on the subsequent events that took place after the death of the original defendant i.e., partition and execution of release deed by his mother, sisters and brothers. However, it is clear from the material on record that the incident of partition of the property and execution of release deed by the mother, sisters and brothers of the petitioner is a subsequent event after the death of the original defendant. Such fact can be brought on record by following the procedure under Order VIII Rule 9 of CPC but not under Order VI Rule 17 of CPC. The reasoning recorded by trial Court that the petitioner did not explain the due diligence

he exercised in taking steps to amend the written statement appears to be correct, but dismissal of petition on the ground that it is filed after commencement of trial is not sufficient cause, both exercise of diligence and commencement of trial are interlinked. Amendment can be allowed after commencement of trial only when the petitioner is able to establish that he exercised due diligence, despite it he could not take steps to get the written statement amended. However, the alleged partition etc., is a subsequent event, such event can be brought on record by following Order VIII Rule 9 of CPC but not under Order VI Rule 17 of CPC. On this ground alone, the petition is not maintainable, and at best, it is open to the petitioner to file a petition under Order VIII Rule 9 of CPC to bring the subsequent events on record after obtaining leave of the Court as required under Order VIII Rule 9 of CPC. Therefore, I find no illegality in exercise of discretion or failure to exercise discretion, which vested on the trial Court in dismissing the petition, warranting interference of this Court exercising the jurisdiction under Article 227 of the Constitution of India. Hence, I find that the petitioner is not entitled to amend the written statement invoking Order VI Rule 17 of CPC. Accordingly, the point is held against the petitioner.

21. However, the petitioner is entitled to bring the subsequent events to the notice of the Court by following the necessary procedure contemplated under Order VIII Rule 9 of CPC subject to the entitlement as per law.

22. With the above observation, the Civil Revision Petition is dismissed at the stage of admission. There shall be no order as to costs.”

10. This Court, of course, in the context of Order VI, Rule 17 of the Code, placing reliance in **Rameshkumar Agarwal v. Rajmala Exports Private Limited**³; **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**⁴; **Rajesh Kumar Aggarwal and others v. K.K. Modi and others**⁵; **Bairam Susheela v. Pendota Rama Rajaiah**⁶; and **A. Krishna Rao v. A. Narahari Rao and others**⁷.

i) In **Rameshkumar Agarwal**³ and **Revajeetu Builders and Developers**⁴, the scope of provisions of Order VI Rule 17 of the Code was analyzed and some basic principles that emerged from the English and Indian Cases were laid down, and while concluding, the Hon'ble Supreme Court held that liberal approach should be the general rule, particularly, in cases where the other side can be compensated with costs, and normally, amendments are allowed in the pleadings to avoid multiplicity of litigations. Even in **Rajesh Kumar Aggarwal**⁵, the Hon'ble Supreme Court ruled that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interests of doing full and complete justice to the parties before the Court, and should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice, and Court should also take notice of subsequent events in order to shorten the litigation, to

³. AIR 2012 SC 1887

⁴. (2009) 10 SCC 84

⁵. (2006) 4 SCC 385

⁶. 2004 (5) ALT 233

⁷. (2014 (6) ALD 258

preserve and safeguard the rights of both parties and to sub-serve the ends of justice. In **Bairam Susheela**⁶, the Hon'ble Supreme Court held that mere grant of permission to amend the pleadings does not confer or take away the rights of the parties, and it shall always be open to the parties to raise such pleas as are open to them touching on the relief introduced through amendment. In **A. Krishna Rao**⁷, it was held that amendment of pleading cannot be rejected even if proposed amendment has effect of raising conflicting plea, and it is for the plaintiff to justify his pleadings and prove the same, and since the procedure being handmade of justice, a party cannot be deprived of his right to raise pleadings by way of an amendment unless proposed amendment results in failure of justice.

11. Now, looking at the additional written statement sought to be filed, for which leave is sought for by the legal representatives of the deceased defendant No.1, the revision petitioner intended to introduce the plea that the other legal representatives of the deceased defendant No.1 released their respective rights over the property covered by the release deed for consideration in his favour. This event took place in the year 2013, and instrument is by way of registered deed. The suit was filed in the year 2007. The death of defendant No.1 occurred on 16.07.2011. Thus, the release deed was executed subsequent to the death of defendant No.1. It is no doubt true, in a suit for perpetual injunction, the vital point that requires consideration is, whether on the date of presentation of plaint, the

plaintiff was in possession of the suit schedule property. Incidentally, title also requires a probe and the entire burden rests on the plaintiff to affirmatively prove that he was in possession of the suit property and an 'obligation' as defined under Section 2 (a) of the Specific Relief Act, 1963, does exist. In the present case, it is no doubt true, the revision petitioner earlier attempted to introduce such a plea, but he intended it by way of amendment to the original written statement filed by his father. That was the reason why the trial Court did not allow it, and this Court in revision preferred by the revision petitioner, rejected the revision affirming the order of the trial Court, but, however, given liberty to the revision petitioner to bring the subsequent events to the notice of the Court by following necessary procedure contemplated under Order VIII Rule 9 of the Code. That has been the reason why the revision petitioner herein moved I.A. No.156 of 2015 seeking permission to file additional written statement. The decisions relied on by the learned counsel for respondent No.1 in **Gajraj**¹ and **P.A. Jayalakshmi**², are not rendered in alike fact-situation as already stated in the above. When liberty is granted by this Court to move an application under Order VIII Rule 9 of the Code and, accordingly, the revision petitioner approached the trial Court by making an application therefor, certainly, there is no ground to reject the permission sought for. The reasons assigned by the trial Court is that the pleadings in the additional written statement which constitute the defence of the revision petitioner vary with the original pleadings put-forth by his deceased father in his written

statement. This is one reason which favours the revision petitioner to grant leave to file additional written statement. Second, it is not as though the defence which he now intended to project was available to the deceased defendant No.1 when he filed written statement originally. As mentioned hereinbefore, the revision petitioner was compelled to approach the trial Court to introduce the said plea in view of the changed circumstances that took place subsequent to the death of his father and after they came on record as legal representatives. Therefore, the permission sought for by the revision petitioner cannot be rejected, more particularly, when allowing such a plea to introduce does not result in failure of justice. One-thing cannot be ignored is that the consequence of rejection of such a request, certainly, once for all would shut the doors to plead the present defence later, which may also have far reaching consequences in case right of the revision petitioner is found to be justifiable. Even otherwise, it is settled proposition of law that from the weaknesses in the case of the defendant, a decree cannot be granted. It is no doubt true, the trial Court observed in the concluding portion of its order that the suit has been pending since 2007, and the plaintiff's side was closed and at the stage when the defendants' required to lead evidence, the revision petitioner has come up with the application under Order VI, Rule 17 of the Code initially, and subsequently the petition under Order VIII Rule 9 of the Code, but it appears this circumstance mostly weighed the trial Court overlooking the liberty granted to the revision petitioner by this Court in earlier CRP referred

to in the above. A direction can be given to the revision petitioner to lead his evidence without seeking unnecessary adjournments to enable the trial Court to dispose of the suit as expeditiously as possible.

12. Therefore, the present Civil Revision Petition is allowed setting aside the order, dated 28.09.2016, passed by the trial Court in I.A. No.156 of 2015 in O.S. No.406 of 2007, granting leave to the revision petitioner in filing the additional written statement. It is open to the respondent No.1 - plaintiff to file his rejoinder and, thereafter, the trial Court is directed to settle relevant additional issue or issues and afford an opportunity to the plaintiff to recall himself to give further evidence in continuation of the evidence already let in including the witnesses examined on his behalf and also to give opportunity to examine further witnesses, if any, and thereafter, to proceed with recording of evidence of defendants. Since the suit relates to the year 2007, a decade is already over. It appears for one reason or other the disposal of original suit was stalled. It is, therefore, desirable to direct the trial Court to dispose of by fixing timeline. Therefore, the trial Court is directed to dispose of the suit as expeditiously as possible, preferably, not later than six (6) months from the date of receipt of a copy of the order. Both parties are directed to co-operate with the trial Court.

As a sequel thereto, miscellaneous petitions if any pending in the Civil Revision Petition shall stand closed.

A. SHANKAR NARAYANA, J

September 04.2017
Gbs/Mgr

