

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.169 of 2016

ORDER:

1 This Civil Revision Petition, under Article 227 of the Constitution of India, is filed assailing the order dated 08.09.2015 passed in I.A.No.305 of 2015 in O.S.No.149 of 2014 on the file of the Court of the III Additional Senior Civil Judge, Kakinada.

2 Sri M.S.R.Subrahmanyam, the learned counsel for the petitioner attacked the order of the trial Court on the following grounds:

1) The finding of the trial Court that the petitioner ought to have filed two different petitions, as the reliefs sought by him are distinct, in view of Rule 55 of the Andhra Pradesh Civil Rules of Practice and Circular Orders, 1990 (hereinafter referred to as Civil Rules of Practice) is not sustainable, 2) the finding of the trial Court that the proposed respondent is not a necessary and proper party to the suit is contrary to the stand taken by the respondent Nos.1 and 2 and, 3) the proposed respondent, being a beneficiary under the contract agreement, is a necessary and proper party to the suit.

3 ***Per contra***, Sri J. Prabhakar, the learned counsel for the respondents submitted that the two reliefs sought by the petitioner are distinct, therefore, the trial Court has rightly dismissed the petition holding that Rule 55 of the Andhra Pradesh Civil Rules of Practice is applicable to the facts of the case on hand. He further submitted that the proposed respondent, being not a party to the contract agreement, is not a necessary and proper party to the

suit. It is his further contention that the findings recorded by the trial Court are supported by material available on record and there is no illegality or irregularity in the impugned order, which warrants interference of this Court to set aside the same by exercising the jurisdiction under Article 227 of the Constitution of India.

4 The facts germane to the filing of the present Civil Revision Petition are as follows:

5 On 29.08.2010 the petitioner and the first respondent entered into a contract agreement whereunder the petitioner agreed to construct a house in the vacant site belongs to the first respondent. In pursuance of the said agreement, the first respondent paid Rs.10,000/- to the petitioner and subsequently paid a total amount of Rs.11,64,500/- on different dates. The petitioner constructed the house under the supervision of the respondent Nos.1 and 2. After completion of the construction work, the respondent Nos.1 and 2 did not pay the entire amount as agreed by them. Having no other alternative, the petitioner filed O.S.No.149 of 2014 on the file of the Court of the III Additional Senior Civil Judge, Kakinada against the respondent Nos.1 and 2 for recovery of an amount of Rs.8,19,220/- along with subsequent interest.

6 The respondent Nos.1 and 2 filed written statement alleging that the vacant site on which the building was constructed belongs to the wife of the first respondent.

7 Pending suit, the petitioner filed a petition under Order I Rule 10 CPC and Order VI Rule 17 CPC r/w Rule 28 of the Andhra Pradesh Civil Rules of Practice and Circular Orders, 1990 seeking to permit him to implead the proposed respondent as third defendant to the suit.

8 The third respondent herein filed counter opposing the said petition. Respondent Nos.1 and 2 adopted the counter filed by the third respondent. The trial Court dismissed the petition on two grounds. 1) The petitioner has not filed two separate petitions as contemplated under Rule 55 of the Civil Rules of Practice, and 2) the third respondent is not a party to the agreement dated 29.08.2010.

9 The predominant contention of the learned counsel for the petitioner is that the main relief sought is under Order I Rule 10 CPC and amendment of pleading is a consequential relief; therefore, there no necessity to file two separate petitions in view of Rule 28 of Civil Rules of Practice.

10 On the other hand the learned counsel for the respondents submitted that the relief sought under Order I Rule 10 CPC and Order VI Rule 17 CPC are not one and the same and hence two separate petitions are necessary.

11 To substantiate the arguments, the learned counsel for the petitioner has drawn my attention to the ratio laid down in the following decisions:

Kavali Narayana and others vs. Kavali Chennamma¹ wherein

this Court at Para No.9 held as follows:

9. It is true that Rule 55 of the Civil Rules of Practice mandates that separate application for each distinct prayer shall have to be filed. If several reliefs are claimed in the same application, the Court may direct the applicant to restrict it to one such relief. An exception to this mandate is where one relief claimed in that application is consequential to the other. It is beneficial to extract Rule 55 and it reads as under:

"Separate Application for each distinct prayer:-
There shall be separate application in respect of each distinct relief prayed for. When several reliefs are combined in one application, the Court may direct the applicant to confine the application only to one of such reliefs unless the reliefs are consequential and to file a separate application in respect of each of the others.

From a reading of the same, it is evident that filing of individual applications for separate reliefs is not a universal principle. Much would depend on the nature of reliefs. In the matter of filing of applications, either under Rule 9 or 13 of Order 9 C.P.C., condonation of delay, when ever such applications are filed beyond the stipulated period of limitation, is interconnected to the main relief, namely to set aside the order dismissing the suit for default or to set aside the ex parte decree. In many cases, the grounds, which are found to be sufficient for condonation of delay, are treated as holding good for the other or consequential relief to set aside the orders dismissing the suit for default or an ex parte decree. These two reliefs are so inter-connected with each other that one cannot exist in the absence of the other. For example, mere condonation of delay without consideration of the application under Rules 9 and 13 of Order 9 C.P.C., is of no use. Similarly, unless an application under Section 5 of the Limitation Act is considered, and an appropriate order is passed therein, the applications filed under Order 9 cannot be taken up at all. Therefore, they squarely fall into the category of "consequential" reliefs, which are exempted from the requirement of Rule 55 of Civil Rules of Practice.

Massarath Yasmeen v. Mohammed Azeemuddin² wherein this

Court at Para No.9 held as under:

9. In fact, there is no conflict between the two judgments rendered in the above-mentioned cases. If the relief is separate and distinct as per Rule 55 of Civil Rules of Practice two separate applications have to be filed. When one relief is ancillary to the main relief or inter-connected to the main relief two prayers can be asked for in one petition and those prayers can be granted. Even other wise as per Rule 55 of the Civil Rules of Practice if these two separate applications are necessary the Court may

¹ 2005 (1) ALD 672

² 2011 (6) ALD 598

direct the party making the application to file two separate applications. But when once the party is entitled to the relief, the Court is not supposed to dismiss the petition on the technical ground.

12 As per the principle enunciated in the cases cited supra, Rule 55 of the Civil Rules of Practice can be pressed into service if the reliefs sought are separate and distinct.

Prakash Rao Dandgey v. Satyanarayana Dandgey³ wherein this Court at para No.6 held as follows:

“6. Rule 28 of the Civil Rules of Practice as it stands now deals with seeking prayer for consequential amendment in applications filed for impleadment under Order I Rule 10 and for amendment of pleadings under Order VI Rule 17 CPC. Therefore, the said Rule permits a party to seek the relief of amendment of pleadings also as a consequential relief in an application filed under Order I Rule 10 CPC.”

13 In the present case, the petitioner filed petition under Order I Rule 10 CPC to implead the proposed respondent as third defendant which is the main relief sought by the petitioner. Amendment of pleadings in one way forms integral part of the main relief. Amendment of pleadings depends upon the result of the petition. Undoubtedly, amendment of pleadings in the instant case is a consequential relief. The facts of the case on hand fall outside the purview of Rule 55 of Civil Rules of Practice. The facts of the case on hand are almost identical to the facts in Prakash Rao Dandgey case (3rd supra).

14 Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that the case on hand falls within the purview of Rule 28 but not under Rule 55 of the Civil Rules Of Practice.

³ 2014 (6) ALD 461

Therefore, the finding of the trial Court that the petition filed by the petitioner is not maintainable in view of Rule 55 of the Civil Rules of Practice is not sustainable either on facts or in law.

15 The predominant contention of the learned counsel for the third respondent is that there is no privity of contract between the petitioner and the third respondent and hence the third respondent is neither necessary nor proper party to the suit. To substantiate the argument, the learned counsel for the third respondent has drawn the attention of this Court to the ratio laid down in ***Kasturi v. Iyyamperumal and Others***⁴ wherein the Hon'ble Supreme Court at para No.7 held as under:

“..... From the above, it is now clear that two tests are to be satisfied for determining the question who is a necessary party. Tests are – 1) there must be a right to some relief against such party in respect of the controversies involved in the proceedings; 2) no effective decree can be passed in the absence of such party.”

16 Let me consider the facts of the case on hand in the light of the above legal principle.

17 It is an admitted fact that the petitioner constructed a house at the instance of the first respondent in pursuance of a contract agreement dated 29.08.2010. It is the case of the petitioner that the respondent Nos.1 and 2 have not paid the entire amount due under the said agreement. It is not the case of the respondent Nos.1 and 2 that the petitioner has not completed the construction of the house as per the terms and conditions of the agreement. Admittedly, the third respondent, who is none other than the wife of the first respondent, is not a party to the agreement dated

⁴ (2005) 6 SCC 733

29.08.2010. The second respondent used to inspect the construction work as the first respondent was not residing at Kakinada at the relevant point of time in view of his employment. The petitioner has taken a specific stand in para No.7 of the plaint that the first respondent either personally or through his wife Smt. Anusuri Surya Prabha or through the second respondent made the payments periodically. The first respondent has taken a specific plea in the written statement that the house was constructed by the petitioner in the vacant site which belongs to his wife. It is not the case of the first respondent that he informed to the petitioner at the time of entering into the agreement that he is not the owner of the vacant site on which the building has to be constructed. For the reasons best known to the first respondent, he did not disclose that he is not the owner of the vacant site. If really the first respondent has informed to the petitioner, at the time of entering into the contract agreement dated 29.08.2010 that he is not the owner of the vacant site, certainly, he might have filed separate counter taking that stand. On 30.01.2015 the petitioner got issued a legal notice directing the respondent Nos.1 and 2 to pay the amount. The first respondent did not choose to issue reply stating that he is not the owner of the site in which the house was constructed.

18 The third respondent has not taken a specific stand in the counter filed in I.A.No.305 of 2015 that the first respondent entered into the agreement with the petitioner without her knowledge or consent or with an ulterior motive to deprive her legal

right over the property. It is not out of place to extract hereunder para No.5 of the counter filed by the third respondent in the I.A.

“Even though she is the owner of the property in which the plaintiff made construction as per the agreement between the plaintiff and defendant...”

19 The specific stand of the third respondent is that she is not a party to the contract agreement; hence she is not a necessary and proper party to the suit. In the above factual scenario, whether the trial Court is justified in dismissing the petition filed by the petitioner?

20 The predominant contention of the learned counsel for the petitioner is that though the proposed respondent is not a party to the agreement, being a beneficiary under the agreement, she is a necessary and proper party to the suit in view of Section 70 of the Indian Contract Act. The crucial question to be considered is whether the facts of the case on hand, prima facie, attract the ingredients of Section 70 of the Indian Contract Act or not?

21 In order to appreciate the rival contentions, this Court is placing reliance on the following decisions:

Ram Pratap Kamalia Mills v. State⁵ wherein the Patna High Court at Para No.7 held as under:

“.....There is a decision of this Court in the case of Dominion of India v. Preety Kumar Ghosh {AIR 1958 Pat 203} on all fours, In that case as well, the contract was hit by the provisions of Section 175(3) of the Government of India Act, but the plaintiff was granted relief by applying the provisions of Section 70 of the Contract Act. Sinha J., (as he then was), on referring to a catena of decisions, observed thus :

"I am aware that the plaintiff in his plaint did not refer to Section 70 of the Act,

⁵ AIR 1963 Patna 153

but from the materials on record, if it could be gathered that the ingredients of SECTION 70, as narrated above are present, the Court shall not be justified in refusing relief to the plaintiff."

I would refer to one case more on this point, Ram Nagina Singh v. Governor-General in Council {AIR 1952 Cal 306} Sinha J. held that there was preponderance of authority in favour of the view that if the facts of a case could be fairly brought within the terms of Section 70, Contract Act, and the conditions expressly laid down therein were satisfied, the section should be given effect to and applied irrespective of the fact that there was in fact no contract between the parties. This decision also has been relied upon in the case, just referred to above, AIR 1958 Pat 203. I am, therefore, of the view that although the plaintiff did not refer to Section 70 of the Indian Contract Act in the plaint, yet the facts disclosed, either in the plaint or in the written statement, are sufficient for giving relief to either party and there can be no bar to the application of the provisions of Section 70....."

8. Section 70 reads thus.

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

Under this section, the plaintiff has to prove (1) that he was acting lawfully when he was either making payments or delivering anything to the other party; (2) that he did not intend to do that gratuitously : and (3) that the defendant did enjoy the benefit. The delivery should not be gratuitous; in other words, there must be an element of self-interest also, while making delivery. The section contemplates a case in which there should be certain benefit to the other party. In this view, it has to be ascertained as to what happened in the present case.

Union of India v. Sita Ram Jaiswal⁶ wherein the Hon'ble

Apex Court at Para No.6 held as follows:

6. The three ingredients to support the cause of action under Section 70 of the Indian Contract Act are these: First, the goods are to be delivered lawfully or anything has to be done for another person lawfully. Second, the thing done or the goods delivered is so done or delivered "not intending to do so gratuitously". Third, the person to whom the goods are delivered "enjoys the benefit thereof". It is only when the three ingredients are pleaded in the plaint that a cause of action is constituted under Section 70 of the Indian Contract Act. If any plaintiff pleads the three ingredients and proves the three features the defendant is then bound to make compensation in respect of or to restore the things so done or delivered.

⁶ (1976) 4 SCC 505

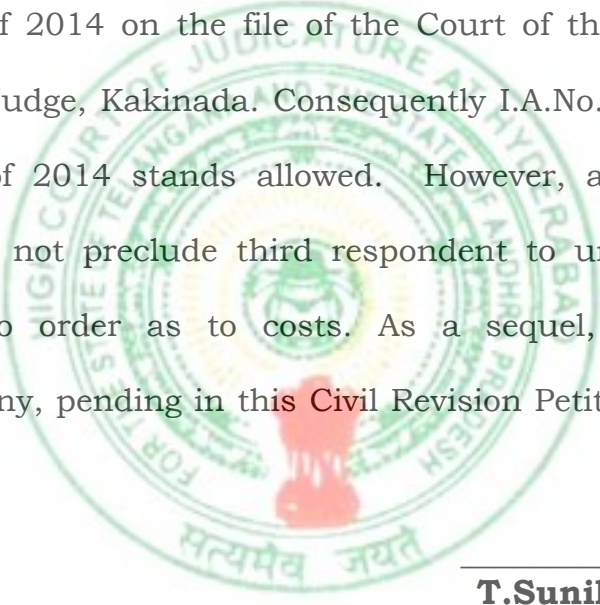
22 It is not the case of the respondents that the petitioner constructed the house gratuitously. It is not the case of the respondents that the contract agreement dated 29.08.2010 is opposed to public policy, thereby legally unenforceable. It is not the case of the third respondent that she is not residing in the house along with her husband (R.1) which was constructed by the petitioner. Though the third respondent is not a party to the contract agreement dated 29.08.2010, the ultimate beneficiary is third respondent only. The third respondent has not taken a specific stand in the counter that she did not make certain part payments to the petitioner as averred in the plaint. The facts of the case on hand prima facie fall within the purview of Section 70 of the Indian Contract Act. The principle enunciated in *Ram Pratap Kamalia Mills* case (5 supra) and *Sita Ram Jaiswal* case (6 supra) squarely applicable to the facts of the case on hand.

23 The petitioner is also claiming relief against the third respondent along with the respondent Nos.1 and 2. It may not be possible for the Court to adjudicate the lis involved in the suit properly and effectively in the absence of third respondent. Viewed from any angle, I am of the considered view that the third respondent is a necessary and proper party to the suit. The trial Court has not considered the material available on record in right perspective and dismissed the petition on the sole ground that the third respondent is not a party to the contract agreement dated 29.08.2010. The decision cited by the learned counsel for the third respondent is not applicable to the facts of the case on hand as the

relief sought against the third respondent has direct bearing on the controversy involved in the suit.

24 The findings recorded by the trial Court are not sustainable either on facts or in law. Having regard to the facts and circumstances of the case, I am of the considered view that it is a fit case to allow the Civil Revision Petition.

25 In the result, the Civil Revision Petition is allowed, setting aside the order dated 08.09.2015 passed in I.A.No.305 of 2015 in O.S.No.149 of 2014 on the file of the Court of the III Additional Senior Civil Judge, Kakinada. Consequently I.A.No.305 of 2015 in O.S.No.149 of 2014 stands allowed. However, allowing of this petition does not preclude third respondent to urge the plea of limitation. No order as to costs. As a sequel, miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand closed.



T.Sunil Chowdary, J

Date:20th February 2017.

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