

THE HON'BLE DR. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.4855 OF 2016

ORDER:

The unsuccessful petitioner before the Principal District Judge, Prakasam at Ongole, in I.A.No.379 of 2016 in the pending suit O.S.No.105 of 2013, maintained the revision against the respondents/defendants of the suit and the application before the lower court supra.

2. The application covered by the impugned order dated 06.06.2016 of the lower court in dismissing the proposed amendment of the plaintiff to include in the Plaint A schedule besides items 1 to 4 already claimed, further items as items 5 to 21 with consequential amendment. It is the averment in support of the amendment petition that the suit is filed for partition of the plaint schedule properties and for allotment of 1/3rd share to the plaintiff, it is the claim based on the bequest in the will dated 02.08.2004 of the testator Subbarao, in favour of the plaintiff and defendants 1 to 5, who is no other than grandfather of defendants 4 and 5 and father in law of 3rd defendant and father of plaintiff and defendants 1 and 2.

3. It is further averred that with the joint family properties covered by the bequests in the will supra, defendants 1 and 2 purchased the other items which are proposed to be included

in the plaint schedule as items 5 to 21 of the Plaint A schedule and thereby those are also to be included, which the plaintiff originally could not know and later came to know. The application was opposed by the counter of the 1st defendant adopted by defendants 2 and 3 by denying about the so called acquisitions are with the property covered by plaint schedule, which is subject matter of the bequests in the will dated 02.08.2004 of late Subbarao. It is their specific contention that the proposed properties to be included are the self-acquired properties of the defendants and plaintiff got no manner of right to include and it is entirely a different cause of action and plaintiff having not chosen to ask cannot now ask for the proposed amendment.

4. The lower court having observed from the respective contentions that simply because respondents purchased some properties they are not to be called as part of the properties acquired with the properties covered by the bequests in the will to seek for amendment of the plaint to include those properties and if it is to be allowed, there is no end for the litigation, thereby, the proposed amendment is baseless and untenable. The contentions in the revision impugning said dismissal order are that, the lower court failed to consider that the proposed amendment is before commencement of trial and it no way changes the existing cause of action, nor causes any prejudice and the dismissal

order is unsustainable and baseless and observations are superficial.

5. Whereas, it is the submission of the counsel for respondents/defendants that the impugned order is reasoned one to the conclusions arrived and no way requires interference for this court while sitting in revision within the limited scope and thereby liable to be dismissed.

6. From the pleadings before the lower court covered by the impugned order, the properties proposed to be included as Plaintiff A schedule items 5 to 21, besides originally mentioned four items of A schedule of the plaintiff concerned, is as per the plaintiff those are acquired with the nucleus of the joint properties covered by the testamentary succession of the bequests in the will dated 02.08.2004 and plaintiff later came to know of the same; whereas the context of the defendants are that those are the self-acquired properties of the defendants and never form part, much less, acquired with any of the nucleus of the properties covered by the bequests in the said will. It is a disputed question of fact to be decided during trial. The only thing to be considered is the rider of due diligence has no application for trial not commenced. Even taken from the contention of the counsel for the revision respondents/defendants of chief examination affidavit of the plaintiff filed before the trial court and it is deemed as trial commenced, mere filing of affidavit in chief is not evidence

from the very wording of Order 18 Rule 4 CPC r/w Section 1 of the Indian Limitation Act, more particularly from the expression of the Apex Court in Amith Trading Corporation of 2004 saying unless the affidavit is taken on oath to form the same as evidence in chief examination. Once such is the case, there is no commencement of trial in the case on hand, thereby the rider provided by Order VI Rule 17 by the CPC amendment in 2002 has no application. This law is fairly settled including from several expression of the Apex Court that an amendment can be made even at the second appeal stage, provided, it will no way takes away the existing right of the opposite party and not setting up any new cause of action prejudicial to the accrued rights of the opposite parties.

7. The inclusion of the properties no way creates a new cause of action in the suit for partition nor prejudice to the any accrued rights of the defendants. Once such is the case, the only thing to be considered from the rival contentions is had it been really the plaintiff in joint possession along with items 1 to 4 of the plaint schedule properties originally described with the plaint, he could have been mentioned the proposed items to be included also, but for not in joint possession, thereby he cannot seek for payment of fixed court fees of Rs.200/- to include these items without payment of the *ad valorem* court fees as contemplated by Section 34 of the Court Fees Act.

8. Having regard to the above and with the above observations, by setting aside the dismissal order, the lower court is directed to allow the amendment by collecting court fees with consequential amendment which is without prejudice to the defense of the defendants including to take any type of plea regarding the plaintiffs non entitlement of the newly included items in their written statement in detail for answering the same by framing specific issues.

9. Accordingly, this civil revision petition is allowed. Miscellaneous petitions pending consideration, if any, in this case shall stand closed in consequence. There shall be no order as to costs.

07.11.2017
SS

DR.B.SIVA SANKARA RAO, J

