

THE HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CIVIL REVISION PETITION Nos.4027 & 4028 of 2014

COMMON ORDER:

These two civil revision petitions are filed against separate orders, passed on 01.08.2014 in I.A.Nos.220 & 221 of 2014 in O.S.No.222 of 2013, by the Senior Civil Judge, Nandigama.

The suit O.S.No.222 of 2013 was filed for partition. The plaintiff and the sole defendant are sisters. The admitted facts are that after the trial concluded and when the matter was posted for arguments, I.A.No.220 of 2014 was filed under Order 6 Rule 17 CPC to amend the plaint by adding item Nos.II to V to the plaint schedule, and I.A.No.221 of 2014 was filed to reopen the matter.

I.A.No.220 of 2014 was opposed by the respondent by filing a detailed counter. The matter was heard and the impugned orders were passed, by which, the applications were allowed, as a result of which, the matter was reopened and the amendment was directed to be carried out. Questioning the same, these two revision petitions are filed.

Learned counsel for the petitioner submits that entire trial was concluded, arguments were heard and the judgment was reserved and at that stage, these two applications were filed. He further argues that the proviso to the amended Order 6 Rule 17 CPC clearly applies to the facts of the case. It is his contention that the affidavit is absolutely silent as to the "due diligence", which is required under the proviso to Order 6 Rule 17 CPC. In addition, he also points out that in the plaint, the respondent/plaintiff has taken a specific plea that except the property shown in the plaint schedule, there is no other joint family property. He

also points out that PW 1 in her cross examination clearly admitted that she sold away Item 3 of schedule and other property to third parties in the year 2004, and that therefore, it is not correct to state that the respondent/plaintiff did not have knowledge of other joint family properties.

On the other hand, the contention of the learned counsel for the respondent/plaintiff is that the suit is filed for partition, and it is at the stage of passing of preliminary decree and therefore, adding another property would not cause prejudice to the present petitioner. It is his further contention that as the respondent/plaintiff was not aware of the existence of property, she could not file the application earlier and after she realized that there is another property that is existing, she filed the application. His contention is that the amendment sought for should be allowed for the purpose of determining the real questions in controversy between the parties.

The point that arises for consideration in this revision petition is whether the lower court committed any error in allowing these two applications.

The facts which are not dispute are that the matter was reserved for judgment after completion of the trial and completion of the arguments also. At this stage, the above applications were filed seeking to reopen and to amend the plaint.

A reading of the application I.A.No.220 of 2014 shows that there are no averments to the effect as to how and when exactly the respondent/plaintiff came to know that the joint family is possessing another property. The affidavit is also silent about the due diligence that

is required to be proved. Absolutely, there is no whisper to show why she was not aware of the existence of the property and only the averment made in the affidavit is that as she was staying in different village, she does not know the details of the property.

This court notices that the very purpose of introducing the amendment to Order 6 Rule 17 CPC and the proviso thereto would be defeated if such amendments are allowed. The new proviso has been added to the Rule stating that no application for amendment of the pleadings shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of “due diligence”, the party could not have raised the matter before the commencement of trial.

As seen from the affidavit, virtually nothing is mentioned about the due diligence or the reason why the petitioner could not find out about the existence of other property. In view of the amended provision of Order 6 Rule 17 CPC, the Courts have been cautioned not to exercise the discretion vested in the court too liberally and literally. The proviso, to some extent, curtails the discretion to allow amendment at any stage. If due diligence is pleaded and proved the post-trial amendment could be allowed. In this case, the same is conspicuously absent. The language used in the proviso to Order 6 Rule 17 CPC is “mandatory”. The lower court has ignored the mandatory language of the proviso to Order 6 Rule 17 CPC. Hence this court is of the opinion that the exercise of jurisdiction by the court below is incorrect and not in accordance with law.

In view of the above, these two civil revision petitions are allowed, and the orders passed on 01.08.2014 in both I.A.Nos.220/2014 and

221/2014 are set aside. In the circumstances, there shall be no order as to cost.

Pending miscellaneous applications, if any, shall stand closed in consequence.

D.V.S.S.SOMAYAJULU,J

Date: 14.11.2018
Dsr

