

(2007) 12 AP CK 0009

In the Andhra Pradesh High Court

Case No : C.R.P. No"s. 5139, 5175 and 5176 of 2007

Future Builders Co-operative Housing Society

APPELLANT

Vs

S. Malla Reddy and Others

RESPONDENT

Date of Decision : 28-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, Order 6 Rule 5, Order 8 Rule 5(1), Order 8 Rule 9, 151
Constitution of India, 1950 — Article 226, 227
Evidence Act, 1872 — Section 17, 21, 58

Citation : (2008) 3 ALD 231 : (2008) 2 ALT 520

Hon'ble Judges : C.Y. Somayajulu, J

Bench : Single Bench

Advocate : M.V.S. Suresh Kumar, for the Appellant; I.V. Radha Krishna Murthy and Anand Kumar Kapoor, for the Respondent

Judgement

C.Y. Somayajulu, J.—Since common questions of fact and law arise in these three revisions, they are being disposed of by a common order. For the sake of convenience, parties to these petitions would hereinafter be referred to as they are arrayed in the plaint.

2. Plaintiff, who is the revision petitioner in all these revisions, filed the suit against defendants, who are the respondents in all these revisions, for a declaration that it is the owner of the plaint schedule property and for a perpetual injunction restraining the defendants from interfering with its possession thereon, inter alia alleging that it is a Society founded by promoters including the first defendant and is registered under the Cooperative Societies Act and one of its objects is to acquire or purchase land for the benefit of its members and render it fit for habitation. Before its registration, its promoter having identified the plaint schedule land as fit for its purpose negotiated with Mohd.Sarvar, its erstwhile owner, and entrusted the work of completion of its purchase to the first defendant, and gave Rs. 10,000/- to him for that purpose. First plaintiff having obtained a sale deed on 02.01.1979 and transfer of patta in

the names of himself and defendants 2 to 4, who are his wife and sons in respect of the plaint schedule property had, after the plaintiff was registered under the provisions of the Cooperative Societies Act on 28.08.1981, delivered possession of the plaint schedule property to it, and agreed to take steps to mutate its name in the revenue registers and executed a memorandum of agreement on 16.09.1981. Thereafter, defendants in spite of several demands are postponing to take steps for transfer of patta in respect of the plaint schedule property in its name on one pretext or other.

3. Defendants filed a common written statement in the suit on 19.01.1995 admitting the claim of the plaintiffs stating that after the filing of the suit there was a mediation whereat the issue was settled and accordingly as Rs. 1,00,000/- was paid to them, they are willing to transfer the patta in respect of the plaint schedule property in favour of the plaintiff, who acquired title to the plaint schedule property.

4. After the filing of the common written statement on 19.01.1995 defendants filed I.A. No. 2217 of 1995, later renumbered as I.A. No. 162 of 2000 after the suit was transferred to another Court seeking permission to change their advocates on the ground that they are acting detrimental to their interest by filing the written statement contrary to their instructions. After contest by the plaintiff and the counsel that appeared on behalf of the defendants, the trial Court, by the order dated 07.02.2000 permitted the defendants to change their advocates without prejudice to the cases of both sides i.e. their rights and the proceedings before the Bar Council of India subject to the contentions in the memo filed by the defendants counsel. Thereafter defendants filed I.A. No. 415 of 2000 seeking leave of the Court to strike out the pleadings in the written statement or to expunge the written statement filed in their names by their advocate Sri Sunil Kumar and to permit them to file a detailed written statement afresh, as the written statement filed in their name earlier was filed in collusion with the plaintiff contrary to the instructions given by them to their advocates. Defendants also filed I.A. No. 416 of 2000 under Order 8 Rule 9 and Order 6 Rule 5 CPC read with Section 151 CPC seeking leave of the Court to permit them to file a detailed written statement, along with the written statement proposed to be filed by them.

5. During the pendency of the above two petitions, the youngest son of the first defendant filed I.A. No. 1819 of 2000 seeking leave of the Court to implead him as a party to those two petitions. The trial Court by the order dated 08.02.2001 allowed that petition and permitted him to come on record as a second respondent in those petitions.

6. The trial Court, after hearing the rival contentions, had, by its order dated 04.01.2002, dismissed both the petitions I.A. Nos. 415 and 416 of 2000. Aggrieved thereby defendants preferred CRP Nos. 502 and 505 of 2002 to this Court. A learned Judge of this Court, by the order dated 18.09.2002 dismissed both the revisions and confirmed the order of the trial Court. Petitions filed by

the defendants seeking review of the said order, in Rev.C.M.P. No. 2102 of 2003 in CRP No. 502 of 2002, also were dismissed by the learned Judge by the order dated 25.06.2003. Questioning those orders defendants preferred appeals to the apex Court; in Civil Appeal Nos. 7940 to 7942 of 2004 which were dismissed on 15.03.2007 with an observation that dismissal of those appeals shall not have any relevance so far as any other proceedings under any other statute are concerned. Thereafter first defendant filed I.A. SR No. 593 of 2007, under Order 6 Rule 17 CPC, seeking leave of the Court to amend the written statement filed by him. By the order dated 06.07.2007 the trial Court rejected the said application in limine. Questioning the said rejection in limine first defendant preferred CRP No.3374 of 2007 to this Court which was allowed with a direction to register the application without rejecting it in limine. Consequently, the said I.A.SR was registered as I.A. No. 629 of 2007. Later, defendants filed I.A. Nos. 715 and 716 of 2007 under Order 6 Rule 17 CPC seeking leave of the Court to permit them to amend the written statement filed on their behalf as mentioned therein. After contest by the plaintiff, the trial Court by the common order dated 27.09.2007 allowed those petitions permitting the defendants to amend the written statement filed by them as prayed for and directed them to file their respective written statements with earlier pleadings. Questioning the said order allowing the petitions for amendment of the written statement filed by the defendants, plaintiff preferred these revisions.

7. The point for consideration in these petitions is whether the defendants can be permitted to amend the common written statement filed by them?

8. The main contention of Sri M.V.S. Suresh Kumar, the learned Counsel for the revision petitioner, is that the trial Court having rightly held that in view of the specific finding given against them earlier on the plea relating to fraud as a ground for seeking the relief of amendment was in error in permitting the defendants to amend the common written statement, seeking leave to take almost the same pleas which were not permitted to be taken by them by dismissing I.A. Nos. 415 and 416 of 2000 filed by them seeking leave to file additional written statement by overlooking proviso to Rule 17 of Order 6 CPC and without keeping in view the fact that the earlier order in I.A. No. 2217 of 1995 operates as resjudicata and no amendment to a written statement withdrawing the earlier admissions made can be permitted, as held in Y.B. Patil and Others Vs. Y.L. Patil, , Prahlad Singh Vs. Col. Sukhdev Singh, , Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co., , and Heeralal Vs. Kalyan Mal and Others, and also was in error in allowing the petition making use of some of the observations in Usha Balashaheb Swami and Others Vs. Kiran Appaso Swami and Others, which have no application to the facts of this case. He prepared a chart showing the pleas intended to be taken by the defendants in the proposed additional written statement in I.A. Nos. 629 of 2007; 715 of 2007 and 716 of 2000 respectively and the pleas in the additional written statement sought to be filed by them in I.A. No. 416 of 2000, which was dismissed to show that the pleas intended to be taken earlier and which were not permitted to be

taken earlier and the pleas now sought to be taken are almost similar, which is appended to this common order as an annexure.

9. The main contention of Sri I.V. Radha Krishna Murthy, learned Counsel for the first defendant, is inasmuch as the written statement filed by the defendants does not contain admissions which are favourable to the plaintiff, withdrawal of which would not cause prejudice to the plaintiff, and as it is not the case of the plaintiff that it has any registered sale deed in respect of the plaint schedule property in its favour and as the title to immovable property worth more than Rs. 100/- would not get transferred on mere admissions, merely because of the admission in the written statement that plaintiff acquired title to the plaint schedule property, the plaintiff would not become the owner thereof. It is his contention that the defendants, immediately after coming to know about the fraud played on them by their previous counsel, filed I.A. No. 2217 of 1995 seeking permission of the Court to change their counsel and as it is their previous counsel that dragged on that petition which was ultimately allowed on 07.02.2000, and as the first defendant thereafter was advised to file a petition seeking leave to file additional written statement, and to strike out some paragraphs in the earlier written statement, he filed IA. Nos. 415 and 416 of 2000 and as final orders in those petitions were passed only on 15.03.2007, first defendant filed this petition seeking amendment of the plaint (sic. written statement) and so it cannot be said that there was any wilful delay on the part of the first defendant in filing the petition for amendment of the written statement. Relying on Sampath Kumar Vs. Ayyakannu and Another, , where it is held that the delay of 11 years in filing the application for amendment of pleadings by itself is not a ground for rejecting the application, as question of delay should not be decided by calculating the period from the date of institution of the suit only, but the stage up to which the hearing in the suit has proceeded also, he contended that in the circumstances of this case it cannot be said that there is any wilful delay on the part of the first defendant in filing the petition, and so delay per se is not a ground for rejecting the petition. Relying on Nagubai Ammal and Others Vs. B. Shama Rao and Others, he contended that admissions are not conclusive, as to the truth of the matters stated therein it is only a piece of evidence, the weight to be attached to which would depend on the circumstances under which it is made, and can also be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, first defendant has a right to withdraw the admission said to have been made by him in the written statement, after coming to know that it was the result of fraud played on him by his earlier counsel in collusion with the plaintiff. Relying on Nagubai Ammal and Others Vs. B. Shama Rao and Others, and Nagubai Ammal and Others Vs. B. Shama Rao and Others, he contended that inasmuch as admissions only shifts the onus on to the person admitting the fact, and their maker has the liberty to prove that they are mistaken or are untrue, and in cases where the truth is known to both parties the principle stated in Chandra Kunwar v. Narpat Singh ILR ALL 184 [PC] would not apply, and as the plaintiff does have

knowledge that the written statement filed by the first defendant was the result of the fraud played on the first defendant by him in connivance with the earlier counsel for the first defendant, first defendant has a right to withdraw the admission made in the written statement because the plaintiff did not at any time thereafter act on the admission allegedly made by the defendants in their written statement. It is his contention that inasmuch as the defendant has a right to take inconsistent pleas in the written statement merely because the plea intended to be taken by way of amendment is inconsistent with the earlier plea, the same cannot be rejected on that ground, by relying on Baldev Singh and Others Etc. Vs. Manohar Singh and Another Etc., in support of that contention. Taking support from the observations made in Usha Balashaheb case (5 supra) that principles that are to be applied to petitions for amendment of plaint and written statement would be different and that addition of a new ground of defence, or substituting or altering a defence, or taking of inconsistent pleas in written statement can be allowed as long as they do not cause prejudice to the plaintiff, he contended that though some of the pleas intended to be taken by the first defendant by way of amendment may be inconsistent with the plea taken in the written statement filed earlier the trial Court did not commit an error in allowing the petitions for amendment. It is his contention that inasmuch as fraud vitiates all judicial acts, fraud played on the defendants by the plaintiff in connivance with their earlier counsel can be brought to the notice of the Court at any time, even by seeking an amendment to the written statement filed by them, so that there would be record to show that fraud was played on the defendants by the plaintiff and their earlier counsel. Relying on Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , Arjun Singh Vs. Mohindra Kumar and Others, and The United Provinces Electric Supply Co. Ltd., Allahabad Vs. Their Workmen, he contended that the orders in I.A. Nos. 415 and 416 of 2000 do not operate as res judicata, in these petitions filed on the basis of the facts discovered subsequent to or during the pendency of those proceedings, and so the order of the trial Court allowing the petitions for amendment of the written statement needs no interference.

10. Sri Anant Kumar Kapoor appearing on behalf of defendants 2 to 4 while adopting the contentions of the learned counsel for the first defendant, relying on Canbank Financial Services Ltd. Vs. The Custodian and Others, , where it is held that title vested in a person can be divested only in accordance with a statute but not otherwise, and so admission cannot create or transfer title, contended that inasmuch as the plaintiff, in whose favour there is no title deed in respect of the plaint schedule property, had admitted in the plaint that the plaint schedule property was purchased in the name of the first defendant, it cannot merely on the basis of the admission said to have been made by the defendants in the written statement claim declaration of its title to the plaint schedule property. Relying on Sita Ram Bhau Patil Vs. Ramchandra Nago Patil (Dead) by Lrs. and Another, , where it is held that though admissions, in view of Sections 17 and 21 of the Evidence Act, are substantive evidence by themselves, they are not

conclusive proof of the matters admitted, Dattatraya Vs. Rangnath Gopalrao Kawathekar (Dead) by his legal representatives and Others, where it is held that admission is a piece of evidence and that it is open to the person who made the admission to prove that those admissions are not true, and the observations in Narayan Bhagwantrao Gosavi Balajiwale case (9 supra), Divisional Manager, United India Insurance Co. Ltd. and Another Vs. Samir Chandra Chaudhary, , where it is held that admissions are not conclusive proof of the facts admitted and may be explained or shown to be wrong and, on Balraj Taneja and Another Vs. Sunil Madan and Another, , where it is held that notwithstanding the admissions made by the defendant in his written statement, the Court can require the plaintiff to prove the facts pleaded by him in the plaint in view of Section 58 of the Evidence Act and Rule 5(1) of Order 8 CPC, plaintiff would not in any way be prejudiced by the defendants taking a plea that the admission allegedly made in their written statement, as a result of the fraud on them, is a wrong statement and that they never intended to make such admission and that fact can be established by them adducing evidence during trial because the Court at any stage of the suit can grant leave to amend the pleadings by relying on L.J. Leach and Company Ltd. Vs. Jardine Skinner and Co., , Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil and Others, ; Nichhalbhai Vallabhai and Others Vs. Jaswantlal Zinabhai and Others, , Ganesh Trading Co. Vs. Moji Ram, , in support of his contention that the Court for promoting the ends of justice can permit amendment of pleadings at any stage of the suit and relied on Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudary 1995 (3) SCC 179 where it is held that a defendant can take contrary stands by seeking amendment of the written statement and the observation in Baldev Singh case (10 supra), that inconsistent pleas can be raised by the defendants in written statement although they may not be permissible in case of petition for amendment of plaint by plaintiff and contended that even defective pleadings can be permitted to be cured. Written statement by taking contrary or contradictory stands can be permitted in as much as the written statement is a part of it. Relying on K.R. Krishna Murthy Vs. Hyderabad Allwyn Ltd., where it is held that a part of Order 6, Rule 17 CPC is mandatory and the other part is directory and the Court while considering an application for amendment should not go into the correctness or falsity of the case in the proposed amendment and as the case of the defendants fall under second part of Rule 17 of Order 6 CPC, which mandates the Court to allow amendments which are necessary for the purpose of determining the real question in controversy between the parties, and as the controversy in the suit relates to the title of the plaintiff to the plaint schedule property, the trial Court rightly allowed the petition for amendment filed by the defendants. It is his contention that the proviso to Order 6 Rule 17 CPC introduced by way of 2002 amendment to CPC, that petition for amendment should not be allowed in suits in which trial has already begun, does not apply to this case because that amendment came into force long subsequent to the filing of the suit and relied on State Bank of Hyderabad v. Town Municipal Council 2007 (1) ALT 23 (SC) : 2006 (8) SCJ 918 : (2007) 1 SCC 765 in support of the said contention. It is his

contention that the suit filed by the members of the plaintiff-society for specific performance of the agreement of sale said to have been executed by the first defendant they sought for possession of the plaint schedule property and as admissions made by a party in plaint signed and verified by him can be used as evidence in other suits as held in *Basant Singh Vs. Janki Singh and Others*, , defendants can make use of the said admission and seek leave to amend the written statement bringing to the notice that fact also. Relying on *Roshan Deen Vs. Preeti Lal*, , where it is held that the purpose of Articles 226 and 227 of the Constitution of India is to see that no man should be subjected to injustice by violating the law and so, the High Court by merely picking out an error of law through an academic angle, without obsessions whether injustice resulted cannot interfere with the orders of Courts and erase justice in the name of correcting an error of law, and AIR 1975 1297 (SC) , where it is held that the High Court, while acting under Article 227 of the Constitution of India, cannot interfere with findings of fact recorded by the subordinate court or tribunal as its function is limited to seeing that the subordinate court or tribunal functions within the limits of its authority and it cannot correct mere errors of fact by examining the evidence and re-appreciating it, and contended that as the trial Court, allowed the amendment, in the interest of justice, it cannot be said that it acted beyond the authority vested in it, and relying on *Associated Stone Industries (Kotah) Ltd. Vs. Commissioner of Income Tax, Jaipur*, , where it is held that in civil actions, if a party prays for a larger relief and if the court holds that he is not entitled to that relief and is entitled to a lesser relief, the Court can grant the latter relief, he contended that merely because the trial Court dismissed the earlier petitions, it did not commit any error in allowing the petitions for amendment of the written statement. He also relied on *Rahimbhoy Hubibbhoy v. Turner* 20 I.A. 1, where it is held that a man who gets property by playing fraud and if the person on whom he played fraud files a suit for recovery of the property, the person who played the fraud has to show that the person injured by his fraud and suing to recover the property, has had clear and definite knowledge of the facts which constitute the fraud and on *Khagendra Nath Mahata v. Pran Nath Roy* 22. I.A. 99 ; *Syed Shah Ghulam Ghouse Mohiuddin and Others Vs. Syed Shah Ahmed Mohiuddin Kamisul Quadri (Died) by Lrs. and Others*, ; *Pallav Sheth Vs. Custodian and Others*, ; *A.V. Papayya Sastry and Others Vs. Government of A.P. and Others*, ; *Ramesh B. Desai and Others Vs. Bipin Vadilal Mehta and Others*, and *Ram Chandra Singh Vs. Savitri Devi and Others*, , where it is held that fraud vitiated all transactions and anything obtained by fraud is liable to be set aside at any stage after the party on whom the fraud is played comes to know about the fraud played on him and contended that inasmuch as the defendants, immediately after coming to know about the fraud played on them by their former advocate in collusion with the plaintiff took necessary steps and as the written statement filed by the defendants is vitiated by fraud, and as the circumstances under which that written statement was filed have to be explained by defendants, and as the Court can, after trial give a finding, on the pleas taken by the defendants in the written statement and the amendments made thereto, and since the

petitions dismissed earlier were to strike out written statement and receive a fresh written statement, plaintiff would not in any event be put to any prejudice and as the trial Court allowed the petitions after taking into consideration all the relevant facts, which are necessary for the disposal of the case, revision petitioner is not entitled to any relief.

11. In reply, the contention of the learned counsel for the plaintiff is that the plaintiff as P.W. 1 was examined on 07.03.2000 and during the middle of his cross-examination on 08.02.2002, the trial Court in pursuance of the order dated 04.12.2001, clubbing two other suits with this suit permitted his further chief examination and his cross-examination was completed on 31.01.2006 and as the suit is a part-heard suit, petitions for amendment filed long subsequent to the evidence of P.W. 1 began are not maintainable in view of the proviso to Rule 17 of Order 6 CPC, and in any event as the substantial relief sought in these petitions is to re-introduce the very same pleas that were sought to be taken and rejected by the trial Court, this Court and the Apex Court on an earlier occasion the trial Court erred in allowing the petitions seeking to amend the written statement.

12. Most of the contentions raised by the learned counsel for the defendants (sic. plaintiff) relate to the merits of the contentions on the pleas sought to be introduced by way of amendment to the written statement. As per the ratio in Rajesh Kumar Aggarwal case (25 supra), relied on by the learned counsel for the defendants, the Court, while considering the application for amendment, should not go into the correctness or falsity of the proposed amendment and should not record a finding on the merits of the pleas sought to be incorporated by way of amendment. So, it is not necessary to go into the merits or demerits in respect of the contentions raised by the learned counsel for the respondents (plaintiff) with regard to the amendments proposed to be made by the defendants to the written statement filed by them and so the only point for consideration is whether the defendants can be permitted to amend the written statement filed by them.

13. Defendants who filed a common written statement filed three separate petitions seeking different types of amendment to their common written statement. How a common written statement filed by the defendants is amenable to three different types of amendments is beyond one's comprehension. Three petitions for amendment of written statement are filed by defendants, probably is an attempt to show that they have no common interest and that their contentions are different. The axiomatic principle of law is that what cannot be done directly cannot be permitted to be achieved in an indirect fashion. The contention of the learned counsel for the defendants is that inasmuch as the Apex Court, while dismissing the appeals preferred by the defendants, permitted the defendants to file fresh applications, the order dismissing the earlier petitions would not debar the filing of these petitions. That contention cannot be accepted because what is observed by the Supreme Court,

while dismissing the appeals preferred by the defendants through its order dated 15-03-2007, is "The dismissal of these appeals shall not have any relevance so far any other proceedings under any other statute are concerned." So, the observation made by the apex Court relates to proceedings under other statutes, which, obviously, are the proceedings said to have been initiated before the Bar Council by the defendants against their previous counsel. The above observation of the Apex Court cannot be taken as a liberty given to the defendants to file applications for the same relief in another form, or under another provision of CPC for the very same relief.

14. Be that as it may the fact that the defendants filed petitions for striking out pleadings and to file additional written statement and that those petitions were dismissed by the trial Court and that the revision to this Court and appeals to Apex Court met with the same fate is an admitted fact. As stated earlier, learned counsel for the plaintiff filed a comparative table showing the pleas taken by the defendants in the additional statement proposed to be filed along with I.A. No. 416 of 2000 and the amendments now sought to be introduced, in the said written statement through I.A. Nos. 629, 715 and 716 of 2007. A perusal thereof shows that similar pleas taken in I.A. No. 416 of 2000 are now sought to be taken by the defendants in different forms. As the said comparative table is made an annexure to this order, I am not referring in details to the pleas taken by the defendants in I.A. No. 416 of 2000 and these petitions.

15. The ratio in *The United Provinces Electric Supply Co. Ltd.* case (13 supra) that decision on any particular point given in an order of remand does not operate as *res judicata* in an appeal filed against the final order passed after the remand; does not apply to the facts of this case because there is no "order of remand" in this case as plaintiff is not relying on any of the observations in an "order of remand" to contest the applications made by the defendants.

16. In view of the ratio in *Satyadhyan Ghosal* case (11 Supra), *Arjun Singh* case (12 supra) and *The United Provinces Electric Supply Co. Ltd* case (13 supra) successive applications for the same relief cannot be permitted, and they can even be rejected as an abuse of the process of Court.

17. It is contended by the learned counsel for the defendants that subsequent to the filing of I.A. No. 416 of 2000, defendants came to know through the report of an expert that the written statement filed on their behalf was typed on the same typewriter on which the plaint was typed. In the common order challenged in these revisions, the trial Court considered that contention and held that that contention has to be decided at the time of trial, but cannot be considered at this stage. For the reasons given by the trial court, that finding cannot be said to be erroneous.

18. As rightly contended by the learned counsel for the plaintiff, the trial Court which agreed with the contention of the plaintiff that defendants cannot by invoking the plea of fraud seek the amendment sought, allowed the petitions

only on the basis of the observations made in Uday Shankar Triyar Vs. Ram Kalewar Prasad Singh and Another, . In the very same judgment the apex Court held that procedure, a hand maiden to justice, should never be made a tool to darry justice or perpetuate injustice by any oppressive or punitive use.

19. The trial Court without keeping: in view the fact the defendants cannot repeatedly file the petitions for the same relief which was negatived earlier, in a different form by quoting different provisions of law, thought it fit to allow the petitions and thereby virtually set at naught the order of dismissal of I.A. Nos. 415 and 416 of 2000 passed by it earlier which order was confirmed by this Court and the Apex Court also.

20. Therefore, the revisions are allowed and the petitions filed by the defendants are dismissed. No order as to costs.