

(2004) 02 AP CK 0077
In the Andhra Pradesh High Court
Case No : CRP No. 3450 of 2002

Rahimmunnisa Begum and Others

APPELLANT

Vs

Mohd. Mohammadulla Khan Durrani (died) by LRs. and Others

RESPONDENT

Date of Decision : 27-02-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 115

Citation : (2004) 2 ALD 511

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : K. Sarva Bhouma Rao, for the Appellant; S.A. Razack, for the Respondent

Final Decision : Dismissed

Judgement

G. Yethirajulu, J.—This revision petition is filed by the petitioners who are plaintiffs in O.S. No. 112 of 1985 and petitioners in IA No. 21 of 1998 on the file of the Principal Subordinate Judge, Kakinada.

2. The respondents herein are the defendants in the suit.

3. The revision petitioners filed IA.No. 21 of 1998 under Order VI Rule 17 and Section 151 CPC to order amendment of the plaint. The respondents opposed the amendment. The lower Court dismissed the petition through its order dated 10th September, 1999. The plaintiffs, being aggrieved by the order of the lower Court, preferred this revision questioning the validity and legality of the order of the lower Court.

4. The point for consideration is: whether the amendment sought for in the plaint is permissible under law ?

Point Answer:

5. The plaintiffs filed a suit for partition of the suit schedule properties. A

preliminary decree was passed on 7-10-1992 after contest. The plaintiffs filed an appeal questioning the Preliminary Decree with a delay condonation petition. Since the plaintiffs failed to take steps for service of notice on some of the respondents the delay condonation petition was dismissed for default. Therefore, the preliminary decree became final. In the suit, the plaintiffs took the plea that though the properties originally belonged to Dr. Mohammadulla Khan Durrani, they were kept in the name of his first wife Rahimunnisa Begum as benami. Therefore, they are entitled for partition of all the properties.

6. A specific issue was framed to the effect whether some of the properties standing in the name of Fatimunnisa Begum are kept in her name benami. The said plea of benami transaction was not accepted by the Trial Court. The plaintiffs having not succeeded in the partition suit filed the present application after passing of the preliminary decree for amendment of the plaint mainly to introduce the following words:

"Any how as per the will executed by Smt Fatimunnisa Begum the first plaintiff is entitled for items 12 and 15 of the schedule properties with absolute rights."

and also to add the following words:

"excluding items 12 and 15 which devolved on first plaintiff through the will".

7. The plaintiffs introduced the will by stating that Fatimunnisa Begum was in the habit of reading religious books. Several other old women used to come to their house and read those books. In the year 1982 Fatimunnisa Begum died. Subsequently, in 1997 the plaintiffs discovered a will executed by Fatimunnisa Begum in a book known as "Quran-E-Majid" and on reading the contents they came to know that late Fatimunnisa Begum bequeathed the properties covered by item Nos. 12 and 15 of the plaint schedule in favour of the first plaintiff with absolute rights after her death. Therefore, the plaintiffs requested that the amendment may be permitted to be made to the plaint to introduce the theory of the will.

8. The learned Counsel for the respondents submitted that the plaintiffs having taken the plea of benami transaction and having failed in their effort to grab the property, introduced the theory of will. He further submitted that the will said to be executed by Fatimunnisa Begum is an unregistered one said to be traced 15 years after the date of its execution and it is astonishing to know that Fatimunnisa Begum did not inform anybody about the execution of the will or delivering the same to any of the beneficiaries under the said will or to any one of the members of the family. He further submitted that had the will been executed, the scribe or attestors would not have kept quiet after the death of the testator. If the amendment of plaint is allowed it completely changes the character of the suit and if the amendment is allowed it amounts to reopening the preliminary decree of the partition suit which became final. Therefore, he requested to confirm the order of the lower Court by dismissing the revision petition.

9. The learned Counsel for the revision petitioners submitted that under Order VI Rule 17 CPC an amendment to the plaint can be made at any stage of the proceedings and as the final decree proceedings are continuation of the suit, the amendment petition can be maintained and the lower Court erred in dismissing the petition without taking into consideration the legal position in this regard. The learned Counsel in support of his contention strongly relied on certain judgments rendered by the Supreme Court and various High Courts.

10. In *Panchdeo Narain Srivastava Vs. Km. Jyoti Sahay and Another*, , the Supreme Court while considering the aspect relating to Order 6 Rule 17 CPC held as follows:

"withdrawal of admission of a fact can be made through an amendment of the plaint and there shall not be any objection that an admission of a fact cannot be withdrawn."

11. In the case covered by the above decision, the plaintiff described himself in the plaint as the son of uterine brother of one person. Subsequently, the plaintiff moved an application for amendment of the plaint inter alia seeking deletion of the word "Uterine" from the plaint. The Trial Court allowed the application for amendment. The High Court in revision set aside the order of amendment observing that the deletion of the word "Uterine" has some significance and may work in favour of either side to a very great extent. The Supreme Court held that the trial Judge granting the application for amendment was satisfied that in order to effectively adjudicate upon the dispute between the parties, amendment of the pleading was necessary and therefore, the High Court ought not to have interfered in its revisional jurisdiction.

12. In *Somireddi Burrayya and Others Vs. Somireddi Atchayamma*, , a Division Bench of this High Court while considering the implementation of Order 6 Rule 17 CPC and the question regarding the amendment of pleading after passing the preliminary decree held that whether an amendment is to be allowed in a particular case or not is to be decided by the Court having regard to the facts and circumstances of that case. Order 6 Rule 17, Order 20 Rule 3 and Section 153 CPC invest the Court with jurisdiction to allow an amendment even after the preliminary decree is passed.

In the case covered by the above decision the respondent filed a suit for partition and separate possession of 1/3rd share in the plaint schedule properties. A preliminary decree was passed on 27-10-1952 and a Commissioner was appointed to partition the properties. The Commissioner went, to the spot for partition of the properties and an obstruction was caused in respect of one of the items of the property covered by S.No. 177. Subsequently, the plaintiff filed a petition for amendment of the schedule for substituting another item of property included in S.No. 51/1, 52/2, 52/3 and 83 in place of S.No. 171 alleging that she had mentioned by mistake S.No. 171 as part of the joint family properties. It was opposed by the opposite party contending that after the preliminary decree is

passed the Court becomes function officio and it has no jurisdiction to allow any amendment of the plaint. The Trial Court overruled the said objection and allowed the application. Against the said order, a Division Bench of this High Court gave the finding as indicated above.

13, In T.P. Palaniswami and Another Vs. Deivanaiammal and Others, , Nainar Sundaratn, J., of Madras High Court while considering an application under Order 6 Rule 17 CPC for amendment of the plaint held that the Court is not supposed to go into merits and demerits of amendment and express opinion as that can be subject-matter of scrutiny after amendment is allowed. The plaintiffs seeking amendment of the plaint for inclusion of a well in the plaint schedule is valid. In the case covered by the above decision, a preliminary decree was passed in a partition suit on 11-8-1978. Final decree application was filed and as per the order of the Court the Commissioner visited the properties for effecting division. At that time the plaintiffs noticed the omission to include a well in one of the survey numbers as available for division. Therefore, they filed an application for amendment of the plaint under Order VI Rule 17 CPC to include the said well. When the application was dismissed by the Court, which passed the preliminary decree, the plaintiff approached the Madras High Court and the Court gave the above finding, while setting aside the order of the lower Court.

In Awadhendra Prasad Narayan Singh and Others Vs. Raghubansmani Prasad Narayan Singh and Others, , Birendra Prasad Sinha, J., of Patna High Court while referring to Order 20 Rule 18 and Order 6 Rule 17 CPC held in a partition suit, that the suit continues until passing of final decree and amendment of the plaint is possible even after the preliminary decree. Order 6 Rule 17 CPC provides for amendment of pleadings. According to this Rule, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings and all such amendments shall be made as may be necessary for determining the real question in controversy between the parties, the plaint therefore, can be amended only at the instance of the plaintiff and for the purpose of determining the questions in controversy between the parties. This means that an amendment, which will change the nature of the suit, cannot be allowed.

14. In Kalkonda Pandu Rangaiah Vs. Kalkonda Krishnaiah and Others, , Venkatarama Sastry, J., of this High Court held that a suit still continues even after preliminary decree and it is only after passing of final decree the suit can be said to have terminated, it is certainly therefore, open to Courts to amend a plaint and decree schedules at any stage before the passing of final decree.

15. In Hundari Bewa Vs. Keluni Dei and Others, , a Single Bench of Orissa High Court held that under Order 6 Rule 17 CPC amendment of the written statement seeking withdrawal of admission of a fact, which was made by inadvertence or erroneously in ignorance of true fact should be allowed.

16. The above legal position makes it clear that Order 6 Rule 17 CPC empowers the Court to permit the party to amend the pleadings at any stage of the

proceedings before the proceedings of the Court stood terminated, but whether an amendment is to be allowed in a particular case or not is to be decided by the Court having regard to the facts and circumstances of that case.

17. The learned Counsel for the respondents while not disputing the general proposition of law regarding the amendment of the pleadings submitted that in the peculiar facts and circumstances of this case it is not desirable to order amendment of the plaint, which would result in reopening of the preliminary decree, which became final. The learned Counsel for the respondent also placed strong reliance on a set of decisions of the Supreme Court and High Courts which I wish to refer in brief,

18. In *Modi Spinning and Weaving Mills Co. Ltd. and Another Vs. Ladha Ram and Co.*, the Supreme Court while considering an application for amendment of written statement by substituting certain paragraphs held that amendment introducing entirely new case and seeking to displace the plaintiff completely from admissions made by the defendants in the written statement cannot be permitted.

19. In *Heeralal Vs. Kalyan Mal and Others*, , the plaintiff filed the suit for partition. The defendants admitted in the written statement that seven out of ten properties covered by the plaint schedule are joint family properties and only three properties are their exclusive properties. Subsequently they filed an application under Order 6 Rule 17 C.P.C. seeking amendment of the written statement by way of withdrawing earlier admission made regarding seven properties. The Supreme Court held that the said amendment if allowed would displace the plaintiff's case and his right to get preliminary decree for partition, therefore, the amendment is not permissible under law.

20. In *Kumaraswami Gounder and Others Vs. D.R. Nanjappa Gounder (dead) and Others*, , a Full Bench of the Madras High Court held as follows:

"When the amendment sought for sets up a totally different cause of action which ex facie cannot stand on a line with the original pleading, Courts cannot allow such application for amendment. A pleading could only be amended if it is to substantiate, elucidate and expand the pre-existing facts already contained in the original pleadings; but under the guise of an amendment a new cause and a case cannot be substituted and the Courts cannot be asked to adjudicate the alternative case instead of the original case."

21. In *Bhavarlal v. Kuppa Reddi* 1957 (2) An.WR 21 (SN), Umamaheswaram, J., while considering the question whether an amendment can be allowed even after the preliminary decree held that where a question has arisen as to whether it is open to invoke the provisions of Order 6 Rule 17 CPC and claim that an amendment of the written statement might be allowed even after the passing of a preliminary decree, having regard to the provisions of Section 97 C.P.C. it is not open to any party to attack the correctness of the preliminary decree except by preferring an appeal. Where the effect of allowing an amendment would

amount to the reopening of the preliminary decree, amendment cannot be allowed.

22. In *M.S. Karuppusami v. Saravana Devei and Ors.* 2002 (3) CCC 368 (Mad.), the plaintiff was in possession of the suit property as on the date of the suit and he filed the suit for permanent injunction. But subsequently, there was disturbance to his possession. He filed an application three years after the filing of the suit requesting to amend the plaint contending that in respect of lot 2 of item No. I of the plaint schedule properties, the defendants were allowed to reside in the said item, which is house property as a licensee and the said licence was revoked on 1-5-1992 and that the Defendants 1 and 2 did not vacate the house and handover possession of the same to him and therefore, he sought for mandatory injunction directing the defendants 1 and 2 for delivery of possession of the said property and for damages. When there was disturbance to his possession on 24-5-1992 the plaintiff sought to introduce a new case that the Defendants 1 and 2 were permitted to reside as licensees and the said licence was revoked on 1-5-1992. Therefore, the cause of action in relation to the incident, which took place prior to the filing of the suit, is found in the amendment application. The cause of action for the plaint and the amendment application is completely contradictory and the application for amendment was sought to be filed only after he lost the battle in the injunction application. The Madras High Court therefore, held that Order VI Rule 17 C.P.C. would not permit such an amendment, as it would result in prejudice to the other party. The Madras High Court further held that the pleading could only be amended if it is to substantiate the pre-existing facts already contained in the original pleadings. But under the guise of amendment, a new cause or a new case cannot be substituted. The Courts cannot be asked to adjudicate the entirely different case instead of original case though it is expedient under certain circumstances to take into consideration the supervening effects in the course of the litigation, it would be hazardous to accept such an application for amendment of the plaint for introducing a new cause of action which was never that of earlier and which is diametrically, opposite to that stated in the original plaint.

23. In *D. Krishna Moorthy v. D. Rangaswami Naidu and Anr.* 1968 (2) ALT 119, Gopal Rao Ekbote, J., of this High Court held:

"Order 6 Rule 17 C.P.C. is wide in its scope and every amendment which is necessary for the effective disposal of the real disputes between the parties should be allowed at any stage of the suit. The only restriction put upon this wide power is that normally no amendment should be allowed if it results in injustice to the other side. While considering an application under Order 6, Rule 17 it should be seen whether the conduct of the party seeking amendment is bona fide and that he has come to the Court with clean hands and has exercised due diligence in the prosecution of the case. Where the defendants were negligent or they had taken their stand deliberately on a certain basis they should not be permitted to take a somersault and adopt any other basis after finding that the

Trial Court's judgment as gone against them. Where the effect of the amendment would be to enable the defendants to escape the consequences of an adverse order after it was given against them by the Trial Court, normally the petition to amend should not be allowed."

24. From the above decisions cited by the learned Counsel for the respondents it is culled out that though the scope of Order 6 Rule 17 is very wide an amendment introducing entirely new case cannot be permitted to be made. The plaintiff's in the present case having taken the plea of benami transaction and failed in it, are seeking amendment to the plaint introducing the theory of the "will", which is an unregistered one and is said to be traced 15 years after its execution and about 12 years after the death of the testator cannot be said to have approached the Court with clean hands in filing the application for amendment and the conduct of the plaintiff's in seeking amendment to plaint is not bona fide. They are seeking the amendment long after their plea of benami transaction rejected and long after the preliminary decree becoming final.

25. After carefully going through the material available on record it is noticed that the plaintiff's did not chose to file the "will" along with the amendment petition and did not mention the date of execution of the "will". The amendment sought to be made, if permitted, would definitely change the nature of the suit and amounts to reopening the preliminary decree, which became final.

26. A judgment rendered by a Single Bench of this Court in Bhavarlal v. Kuppa Reddi 1957 (2) An.WR 21 (SN), is also lending support on this aspect and it was held as follows:

"Having regard to the provisions of Section 97, Civil Procedure Code, it is not open to any party to attack the correctness of the preliminary decree excepting by preferring an appeal. Where the effect of allowing an amendment would amount to the reopening of the preliminary decree, amendment cannot be allowed."

27. I am also convinced with the arguments of the learned Counsel for respondents that after the amendment of CPC, as per the proviso to Order 6 Rule 17, no amendment of the pleading shall be allowed after commencement of the trial. In this matter the plaintiff's kept quiet during the pendency of the suit and after passing of the preliminary decree and dismissal of the appeal, resorted to file this application for the amendment, which is not permissible under proviso to Order 6, Rule 17 CPC. I am also accepting the contention of the learned Counsel for the respondents that the revision petition u/s 115 CPC is not maintainable since the order passed by the lower Court is interlocutory in nature. In the light of the inconsistent pleas taken by the plaintiff's in the suit and in the amendment petition and in the light of the legal bar to permit amendment, I do not find any merits in the revision petition and the amendment cannot be allowed.

28. In the result the revision petition is dismissed as devoid of merits. No order

as to costs.