

IN THE HIGH COURT OF KARNATAKA, BENGALURU

THE HON'BLE MR.JUSTICE R.DEVDAS

WRIT PETITION No.35552/2013 (GM-CPC)

DATED : 17-04-2018

Dr. Joseph Rabindranath Pais S/o Late Edward Anthony Pais vs. Mr.
Derek Aloysius Sunil Kumar Pais Prabhu and Others

ORDER

Defendant No.1 in the original suit has filed this writ petition, being aggrieved by impugned order dated 15.07.2013 passed by the II Addl. Senior Civil Judge, Mangalore, DK on I.A. No.13 filed by the plaintiff under Order VI, Rule 17 read with Section 151 of the Code of Civil Procedure.

2. Respondent No.1 herein, who is the plaintiff in the original suit, filed the suit for relief of partition, permanent prohibitory injunction restraining the defendants from alienating the suit schedule properties and to direct the defendants to render true and correct accounts of all the incomes and profits derived from the suit schedule property and for the cost of the suit.

3. The first defendant filed written statement on 25.10.2003 *inter alia* contending that the suit for partition was not maintainable, since the claim of the plaintiff is based on Wills left behind by their parents and since those Wills were duly probated and by

execution of Release Deed dated 01.01.2003, the administration of the estate of the deceased parents came to an end and that the only remedy available was to sue for administration. It is further alleged in the written statement that by virtue of the Release Deed, the property in question was sold in favour of defendant Nos.4 to 9. In fact, the plaintiff himself speaks about the Release Deed and the Sale Deeds executed by the first defendant in favour of defendant Nos.4 to 9, in the plaint.

4. The plaintiff files an application under Order VI, Rule 17 read with Section 151 of the Code of Civil Procedure on 19.06.2013, ten years after the written statement is filed. While seeking addition of nearly five pages to the plaint, the plaintiff also seeks addition of a new relief seeking declaration that the Release Deed dated 01.01.2003 is null and void and not binding on the plaintiff. The reason assigned for the delay in seeking the relief is that, the plaintiff had given all instructions to his advocate and for the reasons best known to the said counsel, those facts have not been incorporated in the plaint.

5. The Trial Court has passed a cryptic order stating, "on going through the amendment sought by the plaintiff, it will not change the nature of suit, nor

change the cause of action of the suit. If any prejudice or hardship is caused to the defendants, they may be compensated in terms of imposing cost on the plaintiff". Saying so, the learned Trial Judge has imposed costs of Rs.2,000/- and allowed the application.

6. Heard Sri Chaitanya Hegde, learned counsel appearing for the petitioner (defendant No.1) and Sri Cyril Prasad Pais, learned counsel appearing for respondent No.1 (plaintiff).

7. The learned counsel for the petitioner (defendant No.1) contends that the amendment application could not have been allowed at the belated stage of more than ten years after the written statement was filed. He contends that the learned trial Judge was duty bound to consider whether inspite of due diligence, the plaintiff was prevented from raising the facts and issues in the proposed amendment application. He further contends that the new relief sought to declare the Release Deed as null and void is barred by limitation and therefore, the same could not have been allowed. To support his contentions, the learned counsel has relied upon the following judgments:

1. *Radhika Devi v. Bajrangi Singh and Ors. reported in AIR 1996 SC 2358*
2. *Ajendraprasadji N. Pande and Anr. v. Swami*

Keshavprakashdasji N. and Ors. reported in 2007 AIR SCW 513.

8. In the case of *Radhika Devi (supra)*, their Lordships relying upon an earlier judgment in the case of *Laxmidas Dahyabhai Kabarwala v. Nanabhai Chunnilal Kabarwala*, have held that where the party acquires right by bar of limitation and if the same is sought to be taken away by the amendment of the pleading, amendment in such circumstances would be refused. Even after filing of the written statement for three years, no steps were taken to file the application for amendment of the plaint. Thereby, the accrued right in favour of the respondents would be defeated by permitting amendment of the plaint.

9. In the case of *Ajendraprasadji N. Pande and Anr. (Supra)*, the Hon'ble Supreme Court has held that the reasoning given by the Trial Court do not satisfy the requirement of order VI, Rule 17 of CPC without giving the particulars which would satisfy the requirement of law that the matter now sought to be introduced by the amendment could not have been raised earlier in spite of due diligence. Their Lordships have also held that the trial is deemed to have commenced when the issues are settled and the case is set down for recording of evidence.

10. The learned counsel points out that in the instant case, the issues were framed on 16.07.2009 and on 10.06.2011, additional issues were framed by the Trial Court. It is therefore, contended that the trial in the suit was commenced in the year 2011. He further points out that since preliminary issues were raised, the Trial Court allowed the application filed under Order VII, Rule 11 read with Order 14 Rule 2 of CPC to deal with issue No.6 as preliminary issue. The learned counsel vehemently contends that the amendment application has been filed as an after thought, to take away the rights accrued to the defendant by law of limitation and therefore, seeks setting aside of the impugned order passed by the Trial Court.

11. On the other hand, the learned counsel for respondent No.1 seeks to support the impugned order. He has relied upon the following judgments in support of his contentions:

i. *North Eastern Railway Administration Gorakhpur v. Bhagwan Das (D) by L.Rs*, reported in *AIR 2008 Supreme Court 2139*, to contend that amendment of pleadings may be permissible even at appellate stage, provided that the amendment does not work injustice to other party and is necessary for

determination of question in controversy.

ii. *Baldev Singh and others v. Manohar Singh and another*, reported in (2006) 6 Supreme Court Cases 498 - Amendment of pleadings may be allowed where the party is only elaborating and providing more details in respect of facts already brought on record and that the court has wide power and unfettered discretion to allow amendment of pleading in such manner and on such terms as it appears to court to be just and proper.

iii. *Sajjan Kumar v. Ram Kishan*, reported in (2005) 13 Supreme Court Cases 89, where the proposed amendment is necessary to bring real question in controversy between the parties to the fore, refusal to permit amendment is likely to create needless complication at the stage of execution on the event of success of plaintiff in the suit. Though the plaintiff ought to have been diligent in promptly seeking amendment in plaint at an early stage of suit, more so when error in question had been pointed out in written statement, held, still due to the above reasons, amendment should have been allowed.

iv. *Estralla Rubber v. Dass Estate (P) Ltd.*, reported in (2001) 8 SCC 97 - Amendment of pleadings

by defendant ought to have been allowed where purpose of proposed amendment is to elaborate the defence and take additional pleas in support of the case. Delay, on its own is not a ground for rejection of the application, unless serious prejudice would be cause to the other parties and occurred rights taken away as a result of the amendment application being allowed.

v. *Rajesh Kumar Aggarwal and others v. K.K.Modi and others*, reported in *AIR 2006 SCC 1647* - the object of the provision is that the courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.

vi. *Andhra Bank v. ABN Amro bank N.V. and others*, reported in *AIR 2007 SC 2511* - Delay in seeking amendment of written statement is no ground to refuse amendment. The only question that should be considered is whether such amendment would be necessary for decision of the real controversy between the parties in the suit.

vii. *State of Maharashtra v. Pravin Jethalal Kamdar (dead) by LRs*, reported in *AIR 2000 SC 1099*

- where possession is taken under void document, a suit for recovery of possession simpliciter can be filed.

There is no need to seek declaration about invalidity of the document.

12. The learned counsel has also cited an unreported judgments of the Madurai Bench of Madras High Court in W.P.No. (MD) Nos.10004 of 2005 and connected matters in the case of S.K.S. Siva Kumar v. Executive Officer, Inam Karur Municipality and others which is disposed on 28.03.2012.

13. This Court has given its anxious consideration to the arguments of both the parties and perused the judgments cited by them.

14. The Apex Court in the case of *Revajeetu Builders and Developers V/s Narayanaswamy and sons and others*, reported in (2009) 10 Supreme Court Cases 84 Has summed up the factors to be taken into consideration while dealing with applications for amendments, as under:

- i) whether the amendment sought is imperative for proper and effective adjudication of the case.

- ii) whether the application for amendment is bona fide or a mala fide.
- iii) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money.
- iv) refusing amendment would in fact lead to injustice or lead to multiple litigation.
- v) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- vi) as a general rule, the Court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

15. Their LordshipS hasten to add that these are only illustrative and not exhaustive. While concluding, a word of caution is also given, that an application under Order 6 Rule 17 calls for serious judicial exercise and it should never be undertaken in a causal manner.

16. In the instant case, the question that begs consideration is whether the new relief sought for by way of amendment is barred by limitation on the date of application.

17. It is seen from the counter statement of the defendant that he has raised objection to the

amendment application on the ground that the trial has commenced and the relief is barred by limitation. Article 59 of the Schedule in The Limitation Act, 1963 prescribes three years for seeking cancellation or setting aside of an instrument or for the rescission of a contract. It also stipulates that the time from which the period begins to run is when the facts entitling the plaintiff to have the instruments or decree cancelled or set aside or the contract rescinded first becomes known to him. As pointed out earlier, the plaintiff himself alleges in the plaint that the Release Deed dated 01.01.2003 has been clandestinely executed and registered by the defendant in the name of the plaintiff. In the written statement filed in the year 2003, the defendant has specifically asserted that by the execution of Release Deed dated 01.01.2003, the plaintiff has released his rights with respect to the suit schedule property. It is imperative that the plaintiff had the knowledge of the Release Deed, on his own admission in the plaint and as narrated in the written statement, way back in the year 2003. The plaintiff is precluded from seeking a relief of setting aside the said instrument beyond three years from 2003. The judgments of the Hon'ble Supreme Court referred to by the counsel for the petitioner and the respondents

clearly enunciate that where the parties acquire a right under the law of limitation and if the same is sought to be taken away by amending the pleading, such an application in such circumstances should be refused.

18. The learned trial judge has passed a cryptic order without adverting to these aspects. The Trial judge has also not recorded his satisfaction for allowing the amendment application at a very belated stage, after commencement of trial, that in spite of due diligence the plaintiff could not raise these matters in the plaint before the commencement of trial. In the case of *Ajendraprasadji (supra)*, their Lordships have held that the trial is deemed to have commenced when the issues are settled and the case is set down for recording for evidence. Since the trial has begun in the year 2011, the Trial Judge should have recorded his satisfaction before allowing the application.

19. For the reasons stated above, this court is of the considered opinion that the impugned order cannot be sustained.

As a result, the writ petition is allowed and the impugned order is quashed. The amendment application I.A.No.13 in O.S.No.244/2003 on the file of II Addl. Senior Civil Judge D.K at Mangalore is

dismissed.

Parties to bear their own costs.