

SUPREME COURT OF INDIA

P.A.Jayalakshmi

Vs.

H. Saradha

C.A.No.4586 of 2009

(S.B. Sinha and Deepak Verma JJ.)

21.07.2009

JUDGMENT

S.B. Sinha, J.

1. Leave granted.
2. Distinction between Order VIII Rule 9 of the Code of Civil Procedure and Order VI Rule 17 thereof is the question involved in this appeal. It arises out of a judgment and order dated 4.9.2007 passed by a learned Single Judge of the High Court of Judicature at Madras in CRP (NDP) No.1643 of 2007.
3. Before embarking on the said question, we may notice the admitted fact:

“Anantha Subramania Iyer had two brothers. They were members of a joint family. By reason of a deed of partition dated 23.8.1962, the said joint family properties were partitioned in terms whereof the properties involved in the present suit were allotted to Anantha Subramania Iyer. He had two sons and five daughters. Appellant is one of them. He allegedly executed a Will on or about 18.3.1993 in terms whereof he bequeathed the property in suit in favour of his wife. The said Will was said to have been attested by his sons. Anantha Sumramania passed away on 19.3.1993. Indisputably, his wife also passed away on 13.8.1993. P.A. Ganesan, one of the sons of Anantha Subramania Iyer passed away on 24.5.1998 leaving behind his wife and three daughters who are respondent Nos.1 to 4 herein. The said respondents filed a suit for partition in the year 2004. According to them, the suit property was a joint family property and both the brothers being coparceners had 1/3rd share therein. Apart therefrom, they claimed their share also in the property which P.A. Ganesan had inherited from his father, and, thus, the same came to 8/21 for each of the sons of Anantha Subramania Iyer and 1/21 share so far as his daughters including the appellant are concerned.”

4. Appellant filed her written statement on 7.4.2006, inter alia, contending that after the death of Anantha Subramania Iyer, the properties in suit devolved upon each of his children equally as a result whereof she inherited 1/7th share therein. Allegedly, she discovered on or about 5.2.2007 that Anantha Subramania Iyer had executed a Will in favour of his wife. On or about 1.3.2007, she filed an application for leave to file additional written statement. By an order dated 27.3.2007, the learned Trial Judge dismissed the said application, opining :

“10. The petitioner/4th defendant has filed this petition after the start of the enquiry proceedings in this suit and after examination of the PW1 in full stating that one Anantha Subramania Iyer had executed a WILL on 18.3.93, that a copy of the same traced out only now and hence it is to be considered that mentioning of the same in the additional written statement itself would be a belated one and further failure to mention this in the written statement filed on 7.11.2006 and after the start of trial filing a petition seeking permission to file additional written statement with regard to a WILL which has not been mentioned in the written statement seems not acceptable and the petition is a belated one.”

5. Aggrieved thereby and dissatisfied therewith, the appellant filed a Civil Revision Petition which by reason of the impugned judgment has been dismissed by the High Court, stating :

“On a careful consideration of the reasons stated by the learned senior counsel appearing for the Respondent, this Court is of the view that the introduction of the Will said to have been executed by Ananthasubramaniam dated 18.3.1993 could not be considered to receive the same. For the reasons that if the Will is received by the Court, then the rights of the parties will be completely changed. Under such circumstances the share claimed by the Plaintiff in the suit will also be changed. Under such circumstances, this Court is not inclined to interfere with the order passed by the learned Additional District and Sessions Judge, (Fast Track Court No.II), Coimbatore. This Court does not find any valid reasons, the revision is no merits and the same is dismissed. Consequently, concerned M.P. No.1 of 2007 is closed. No cost.”

6. Mr. Vishwanathan, learned senior counsel appearing on behalf of the appellant, would urge :

“(1) The learned Trial Judge as also the High Court committed a serious error in passing the impugned judgment insofar as they failed to take into consideration that in effect and substance, appellant's application should have been treated to be one for amendment of written statement as envisaged under Order VI Rule 17 of the Code of Civil Procedure and not one for leave to file additional pleadings as envisaged under Order VIII Rule 9 thereof.

(2) The appellant having raised a contention that she discovered the existence of Will only on 5.2.2007, even the requirements of the proviso appended to Order VI Rule 17 of the Code of Civil Procedure must be held to have been satisfied.

(3) By reason of the said application, the appellant did not bring about any change in the principal contention raised in her written statement as the said Will was sought to be brought on record wherefor requisite pleadings were necessary only to support her case that the properties in question belonged to Anantha Subramania Iyer and the same was not a joint Mitakshara Coparcenery property.”

7. Mr. B.K. Pal, learned counsel appearing on behalf of the respondent, on the other hand, supported the impugned judgment contending that the appellant had all along contended that the said application was filed in terms of Order VIII Rule 9 of the Code of Civil Procedure.

8. By reason of *Code of Civil Procedure (Amendment) Act, 1976*, measures have been taken for early disposal of the suits. In furtherance of the aforementioned Parliamentary object, further amendments were carried out in the year 1999 and 2002. With a view to put an end to the practice of filing applications for amendments of pleadings belatedly, a proviso was added to Order VI Rule 17 which reads as under:

“17. Amendment of pleadings--The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

Provided that no application for amendment 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. Order VI Rule 17 speaks of amendment of pleadings whereas Order VIII Rule 9 provides for subsequent pleadings by a defendant. The distinction between the two provisions is evident. Whereas by reason of the former unless a contrary intention is expressed by the court, any amendment carried out in the pleadings shall relate back to the date of filing original thereof, subsequent pleadings stand on different footings.”

9. For reasons best known to the appellant, she had chosen to file her application seeking leave to file additional pleadings. Such a stand might have been taken by her with a view to obviate the bar created by reason of the proviso appended to Order VI Rule 17 of the Code of Civil Procedure. The firm stand taken by the appellant both before the Trial Court as also the High Court was that her application was under Order VIII Rule 9 of the Code of Civil Procedure. At no point of time, a contention was raised that she wanted to amend her pleadings.

10. Ordinarily at such a belated stage, leave for filing additional written statement is usually not granted. We may notice that one of the plaintiffs was examined on 1.3.2007. It is accepted at the bar that despite the fact that the appellant is said to have discovered the existence of the Will on or about 5.2.2007, no question was put to the said witness with regard to the said Will or otherwise. It is only at a later stage that the aforementioned application for grant of leave to file additional written statement was moved. There cannot be

any doubt or dispute that the courts should be liberal in allowing applications for leave to amend pleadings but it is also well settled that the courts must bear in mind the statutory limitations brought about by reason of the Code of Civil Procedure (Amendment) Acts; the proviso appended to Order VI Rule 17 being one of them. In *North Eastern Railway Administration, Gorakhpur v. Bhagwan Das (Dead) By LRs.*¹, the law has laid down by this Court in the following terms:

16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil*³ which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. (Also see *Gajanan Jaikishan Joshi v. Prabhakar Mohanlal Kalwar*). Yet again, in *Bollepanda P. Poonacha Anr. v. K.M. Madapa*², the law is laid down in the following terms :

15. A belated counterclaim must be discouraged by this Court. See *Ramesh Chand Ardawatiya v. Anil Panjwani*. We are, however, not unmindful of the decisions of this Court where a defendant has been allowed to amend his written statement so as to enable him to elaborate his defence or to take additional pleas in support of his case. The Court in such matters has a wide discretion. It must, however, subserve the ultimate cause of justice. It may be true that further litigation should be endeavoured to be avoided. It may also be true that joinder of several causes of action in a suit is permissible. The Court, must, however, exercise the discretionary jurisdiction in a judicious manner. While considering that subservance of justice is the ultimate goal, the statutory limitation shall not be overstepped. Grant of relief will depend upon the factual background involved in each case. The Court, while undoubtedly would take into consideration the questions of serious injustice or irreparable loss, but nevertheless should bear in mind that a provision for amendment of pleadings is not available as a matter of right under all circumstances. One cause of action cannot be allowed to be substituted by another. Ordinarily, effect of an admission made in earlier pleadings shall not be permitted to be taken away. See *State of A.P. v. Pioneer Builders*⁶ and *Steel Authority of India Ltd. v. Union of India*⁷ and *Himmat Singh v. ICI India Ltd.* (Emphasis supplied) Yet again, in *Vidyabai Ors. v. Padmalatha Anr.*³, this Court upon taking into consideration the effect of the insertion of proviso to Order VI Rule 17 held as under :

10. By reason of the *Civil Procedure Code (Amendment) Act, 2002* (Act 22 of 2002),

Parliament inter alia inserted a proviso to Order 6 Rule 17 of the Code, which reads as under: Provided that no application for amendment 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. It is couched in a mandatory form. The court's jurisdiction to allow such an application is taken away unless the conditions precedent therefor are satisfied viz. it must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial.

XXX XXX XXX

19. It is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the Code restricts the power of the court. It puts an embargo on exercise of its jurisdiction. The court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the court will have no jurisdiction at all to allow the amendment of the plaint.”

11. We, therefore, do not find any legal infirmity in the orders passed by the High Court. This appeal is, therefore, dismissed with costs. Counsel's fee assessed at Rs.10,000/- (Rupees ten thousand only).

¹(2008) 8 SCC 511

²(2008) 13 SCC 179

³(2009) 2 SCC 409