Before Amol Rattan Singh, J.

RAJ MOHINDER SINGH—*Petitioner*

versus

SURINDER KAUR @ SURINDER AND OTHERS—*Respondents*

CR No. 2566 of 2009

December 11, 2018

Code of Civil Procedure, 1908—O.6 Rl. 17—Hindu Succession Act, 1956—S. 6—Amendment of substantive provision prospective in operation—Amendment of plaint on the basis of 2005 amendment—Challenged—Held, amendment in S. 6 of Act would not affect rights as have accrued prior to December 20, 2004—Any transaction of partition effected thereafter will be governed by explanation—Amendment of plaint set aside.

Held that though I otherwise agree with learned counsel for respondent no.1 that the amendment having been allowed at a stage when the trial was still to commence, in terms of Order 6 Rule 17 of the CPC, and therefore the learned trial Court did not err in holding that all pleas pertaining to the applicability or non-applicability of the amendment, would be considered by it at the time of final adjudication of the suit, however, naturally what this Court cannot ignore, is the judgment cited by Mr.Virk in Prakashs' case (supra), wherein it has been categorically held that the amendment in Section 6 of the Hindu Succession Act would not affect rights as have accrued prior to December 20, 2004, "and the law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the explanation."

(Para 17)

Further held that Hence, once this Court is required to adjudicate upon the issue arising in this petition by referring to the ratio of the law laid down (and cited here) as aforesaid, in my opinion, it would become pointless to allow the amendment sought in the plaint, with virtually it having been considered right now, that the rights of the parties would be unaffected by the amendment in the Act of 1956, the father of the parties admitted (by both sides) to have died on 1.8.1988, with a will stated to have been (naturally) executed prior to that date.

(Para 18)

A.S. Virk, Advocate
for the petitioner.

A.K. Khubber, Advocate
for respondent no.1.

AMOL RATTAN SINGH, J. oral

(1) By this petition, the petitioner challenges the order of the learned trial Court (Civil Judge, Junior Division, Kurukshetra), dated 18.3.2009, by which the application filed by respondent no.1 (plaintiff before the trial Court) under Order 6 Rule 17 CPC has been allowed.

(2) The suit filed by the plaintiff is one seeking a declaration that the will set up by the petitioner herein, stated to have been executed by the father of the parties, is null and void etc. The petitioner and respondent no.1 are siblings, with respondents no.2 to 4 being the children of a deceased brother, respondents no.5 and 6 herein being the sisters of the petitioner, (with the status of respondent no7 qua the family not known to learned counsel for the parties, but it not being in dispute that the current issue is essentially between the petitioner and respondent no.1).

(3) The amendment sought by respondent no.1-plaintiff is to the effect that upon the amendment in Section 6 of the Hindu Succession Act, 1956, having taken place w.e.f. 9.9.2005, the plaintiff has acquired a right to the suit property, it being ancestral and coparcenary property.

(4) In fact, the amendment that is sought to be made in the plaint is reproduced in the impugned order and reads as follows:-

> "2-A. That the suit land mentioned in the heading of the plaint and also in the copies of revenue record which are attached with the plaint, is ancestral and co-parcenary property. The plaintiff is joint owner in possession to the extent of 1/5 share in the suit land by virtue of her birth in the family of her father Sh.Punjab Singh s/o Sh.Natha Singh who were the earlier co-parceners in the suit land mentioned in the heading of the plaint, therefore going to the worst situation Sh.Punjab Singh was not competent to alienate by any means the share of the plaintiff in the ancestral suit property by any means and the alleged will dated 17.7.1988 claimed by the defendants is otherwise also not binding on the right of the plaintiff being null and void document. It may again be submitted that Sh.Punjab Singh never

> executed any will in favour of the defendants at any point of time and there was no eventuality of such situation yet the plaintiff is entitled to take all the pleas which are available to the plaintiff after the passing of the Hindu Succession (Amendment) Act, 2005 which received the assent of his Highness President of India on 5th Sept. 2005."

(5) Naturally, the amendment having come about w.e.f. 9.9.2005, that plea was not taken in the plaint originally filed, the suit having been instituted on 3.1.2004.

(6) The learned trial Court having taken into consideration the aforesaid facts, allowed the application for amendment, on the ground that the plea of the defendant (petitioner herein) to the effect that the amendment would not apply retrospectively, would be an issue to be taken at the time of arguments.

(7) This petition having been filed in the year 2009, at the time when notice of motion was issued on 6.5.2009, operation of the impugned order had been stayed by this Court, the said interim order having been continued thereafter. Though only operation of the impugned order had been stayed to the extent that it allowed the amendment sought by the plaintiff, learned counsel for the parties are *ad idem* that the trial never progressed thereafter.

(8) Subsequently, in the light of the directions issued by the Supreme Court in ***Asian Resurfacing of Road Agency Private Limited and another*** versus ***Central Bureau of Investigation***[1] the learned trial Court started proceeding with the matter.

(9) Therefore, on the last date of hearing, an application was filed by the petitioner, seeking continuation of the order and hence, the controversy in issue being a small one the petition itself was ordered to be listed for final hearing.

(10) [In fact, the petition had been admitted to regular hearing vide an order of this Court dated 17.9.2009].

(11) Mr. Virk, learned counsel for the petitioner, submits that the amendment having been held to be prospective even by the Supreme Court, in ***Prakash and others*** versus ***Phulavati and others***[2] with the same view having been already taken by a coordinate Bench of this Court earlier in **Rameshwar Dass** versus ***Ajmero and others (CR***

---

[1] 2018(2) RCR (Civil) 415
[2] 2015(4) RCR (Civil) 952

No.2136 of 2007, decided on 1.7.2008), allowing the amendment in the plaint would be a wholly unnecessary exercise and consequently, the impugned order needs to be set aside.

(12) *Per contra*, Mr. Khubber, learned counsel appearing for respondent no.1, submits that the learned trial Court has not erred in any manner, the amendment having been allowed at the initial stage itself, i.e. before the trial had commenced, and therefore in any case there would be no violation of the statutory mandate contained in Order 6 of Rule 17 of the CPC, which reads as follows:-

> "**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."

(13) Mr. Khubber also relies upon a judgment of the Supreme Court in ***Rajesh Kumar Aggarwal and others*** versus ***K.K.Modi and others***[3] wherein it is stated as follows:

> "15. In our view, since the cause of action arose during the pendency of the suit, proposed amendment ought to have been granted because the basic structure of the suit has not changed and that there was merely change in the nature of relief claimed. We fail to understand if it is permissible for the appellants to file an independent suit, why the same relief which could be prayed for in the new suit cannot be permitted to be incorporated in the pending suit.
>
> 16. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary

[3] 2006(2) RCR (Civil) 577

> has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.
>
> 17. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case."
>
> (Emphasis applied only in the present judgement)

(14) To similar effect, learned counsel relies upon a judgment of a coordinate Bench of this Court in ***Gautam Sarup*** versus ***Anand Sarup and others***[4].

(15) Having considered the matter, it is first to be noticed that the Supreme Court in the case cited by Mr.Virk, i.e. in ***Prakashs'*** case (supra), after considering the amendment made in Section 6 of the Act 2005, held as follows:-

> "17. The text of the amendment itself clearly provides that the right conferred on a 'daughter of a coparcener' is 'on and from the commencement of Hindu Succession (Amendment) Act, 2005'. Section 6(3) talks of death after the amendment for its applicability. In view of plain language of the statute, there is no scope for a different interpretation than the one suggested by the text of the amendment. An amendment of a substantive provision is always prospective unless either expressly or by necessary intendment it is retrospective ***Shyam Sunder*** versus ***Ram Kumar, 2001(3) R.C.R. (Civil) 754 : (2001) 8 SCC 24, Paras 22 to 27***. In the present case, there is neither any

[4] 2006(4) RCR (Civil) 248

> express provision for giving retrospective effect to the amended provision nor necessary intendment to that effect. Requirement of partition being registered can have no application to statutory notional partition on opening of succession as per unamended provision, having regard to nature of such partition which is by operation of law. The intent and effect of the Amendment will be considered a little later. On this finding, the view of the High Court cannot be sustained.
>
> 23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9th September, 2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20th December, 2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation."
>
> (Emphasis applied only in the present judgment)

(16) In the judgment of the coordinate Bench relied upon by Mr.Virk, i.e. in Rameshwar Dass case (supra), it was held as follows:-

> "13. Consequently, the respondent no.1-plantiff could not be permitted by the learned trial Court to amend her plaint so as to rely upon the amended Section 6 of the 1956 Act."

(17) Though I otherwise agree with learned counsel for respondent no.1 that the amendment having been allowed at a stage when the trial was still to commence, in terms of Order 6 Rule 17 of the CPC, and therefore the learned trial Court did not err in holding that all pleas pertaining to the applicability or non-applicability of the amendment, would be considered by it at the time of final adjudication of the suit, however, naturally what this Court cannot ignore, is the judgment cited by Mr.Virk in Prakashs' case (supra), wherein it has been categorically held that the amendment in Section 6 of the Hindu Succession Act would not affect rights as have accrued prior to December 20, 2004, "and the law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the explanation."

(18) Hence, once this Court is required to adjudicate upon the issue arising in this petition by referring to the ratio of the law laid down (and cited here) as aforesaid, in my opinion, it would become

pointless to allow the amendment sought in the plaint, with virtually it having been considered right now, that the rights of the parties would be unaffected by the amendment in the Act of 1956, the father of the parties admitted (by both sides) to have died on 1.8.1988, with a will stated to have been (naturally) executed prior to that date.

(19) Even though the will in question has been challenged and as such amendment of the plaint would not affect the rights of the parties qua proving the actual validity/invalidity of the will, yet with inheritance admittedly having opened on 1.8.1988, i.e. about 16 years prior to the date from which daughters could claim a right in coparcenary property, as per the judgment of the Supreme Court, in my opinion allowing the amendment will be wholly a pointless exercise.

(20) Of course, it is to be noticed here that in the judgment cited by Mr. Virk, of the coordinate Bench of this Court, it had been noticed that evidence on behalf of the plaintiff had been recorded (and therefore that the trial had commenced in that case), which is not the case presently, however the ground for refusal to allow an amendment in the plaint was that the amendment in Section 6 of the Act of 1956 is to operate only prospectively and not retrospectively.

(21) In fact, it needs to be said that had the ratio of the judgment of the Supreme Court not been specifically cited by Mr.Virk, learned counsel for the petitioner, possibly this Court may not have interfered with the impugned order, the amendment sought by he plaintiff being at a stage prior to the commencement of the trial, with the petitioner-defendant obviously at liberty to take all pleas as were available to him, qua the amendment being applicable prospectively or retrospectively. However, the ratio of the judgment being as aforesaid, with this Court naturally required to refer to its effect, therefore as already said, the purpose of the amendment in the plaint actually stands defeated.

(22) Hence, even taking into consideration the judgment cited by learned counsel for respondent no.1 in ***Rajesh Kumar Aggarwals'*** case (supra), the ratio of that judgment (as stated in paragraph 16 thereof), is to the effect that it is the primary duty of the Court to decide whether an amendment is necessary to decide the real dispute between the parties or not.

(23) Even though in paragraph 17 of that judgment it has also been stated that the court should not go into the correctness or falsity of the case in the amendment, nor should it record a finding on the merits of the amendment sought to be made, yet in the present case, in the

opinion of this Court, "the real controversy test", being whether or not respondent no.1 (plaintiff) can even claim a share in her fathers' property in the capacity of a coparcener, with that right in any case not available to her prior to 20.12.2004 in terms of the ratio of the judgment in ***Prakashs'*** case (supra), and the inheritance admittedly having opened 16 years prior to that date, on 01.08.1988, the amendment sought by the respondent-plaintiff is found to be wholly pointless.

(24) It is naturally however, made absolutely clear that this Court having only commented upon the amendment sought by the plaintiff being a wholly purposeless one, nothing stated hereinabove will be taken by the trial court to be any comment on the merits of the case already set up by the plaintiff, qua her right to her fathers' property either on the basis of natural inheritance or on the basis of any other ground that she has claimed in the plaint, (other than on the ground of being a coparcener), and all other claims made by her would be gone into by that Court wholly on the merits of the evidence led by both sides.

(25) Consequently, this petition is allowed, with the impugned order set aside. The learned trial Court would proceed with the matter henceforth, by only taking into consideration the original pleadings of the parties, *de hors* the amendment in the plaint that has been set aside hereinabove.

Sumati Jund