

MANOJ BEHARI LAL MATHUR AND ANR.

v.

DR. SHANTI MATHUR AND ORS.

DECEMBER 2, 1996

[K. RAMASWAMY AND G.T. NANAVATI, JJ.]

*Code of Civil Procedure, 1908 :*

*Section 151, Order 6 Rule 17—Plaint—Amendment of—Suit filed by appellants' mother for perpetual injunction restraining respondent from alienating the suit property—Second suit filed by appellants for partition and separate possession—Thereafter another suit filed for declaration that respondent was a benamidar and the property belonged to the joint family and, therefore, she has no right, title and interest in the Plaint Schedule Property—Application filed for trial of a preliminary issue—Ultimately when the matter came before Supreme Court this Court directed to try the issues, regardless of the deficiency in the pleadings, whether respondent was a benamidar and whether the provisions of Benami Transactions (Prohibition) Act, 1988 would stand in the way of the appellants—Thereafter application filed for amendment of plaint that respondent was a trustee on behalf of the appellant plaintiffs—Application dismissed by Trial Court and High Court—Appeal—Held, it was open to the appellants, even without resorting to amendment of the plaint, to press their arguments basing on the legal effect of the benami transaction and that respondent was a trustee of the property for the benefit of the joint family—For that purpose, no express amendment was required, nor it was necessary that amendment be made in the plaint—It is open to the court below to proceed with the trial of the suit or to dispose of the preliminary issue in accordance with law.*

*Controller of Estate Duty, Lucknow v. Alope Mitra, [1981] 2 SCC 121, held inapplicable.*

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 15351 of 1996.

From the Judgment and Order dated 16.10.95 of the Rajasthan High Court in C.R.P. No. 27 of 1995.

A Tapas Ray and Indra Makwana for the Appellants.

Harish Salve, Pradeep Aggarwal, Sushil K. Jain, A.P. Dhamija and S. Atreya for the Respondents.

The following Order of the Court was delivered :

B Leave granted.

We have heard learned counsel on both sides.

C This appeal by special leave arises from the order of the single Judge of the High Court of Rajasthan at Jaipur, made on October 16, 1995 in CR No. 27/95.

The admitted facts are that the appellants' mother had initially filed suit No. 318/88 for perpetual injunction restraining Dr. Shanti Mathur and others from alienating the property bearing No. D-34, Subhash Marg, D C-Scheme, Jaipur. Subsequently, the appellants also filed suit on 1.12.1988 for partition and separate possession of 1/4 and 3/4 shares respectively. Thereafter, the present Suit No. 30/90 was filed for declaration that Dr. Shanti Mathur was a benamidar and the property belonged to the joint family and, therefore, she has no right, title and interest in the Plaint E Schedule Property. An application was filed in the trial court for trial of issue No. 7 as a preliminary issue. Ultimately, the matter had come to this Court wherein this Court directed to try the issues, regardless of the deficiency in the pleadings, whether Dr. Shanti Mathur is a benamidar and whether the provisions of Benami Transactions (Prohibition) Act, 1988 would stand in the way of the appellants. Subsequently, an application F under Order 6, Rule 17 read with Section 151 CPC came to be filed for amendment of the plaint on the ground that Dr. Shanti Mathur was a trustee on behalf of the appellants-plaintiffs. The trial Court as well as the High Court in the impugned order dismissed the application. Thus, this appeal by special leave.

G It is contended by Mr. Tapas Ray, learned senior counsel appearing for the appellants, that Dr. Shanti Mathur stands in a fiduciary capacity as a trustee on behalf of the appellants-plaintiffs and the members of the joint family. The circumstances in which the property came to be purchased in the name of Dr. Shanti Mathur have elaborately been stated in H the plaint filed in all the three suits though different reliefs have been

sought in the suits. In the first suit, the relief prayed for was perpetual injunction and it was sought that Dr. Shanti Mathur was attempting to alienate the property. Subsequently, when it was found to have been alienated, suit was filed for partition. When title to the property was set up independently on behalf of Dr. Shanti Mathur, third suit came to be filed for declaration. Under these circumstances, the amendment sought for does not change the nature of the suit or cause of action; nor is any different cause of action introduced. Even inconsistent pleading can be raised by plaintiffs at any stage and it is the discretion of the court to see whether in the facts and circumstances of the case, the amendment to the plaint is necessary. In this case, instead of leaving the ambiguity for future arguments, an express pleading is sought to be brought on record by amending the plaint and by pleading that Dr. Shanti Mathur is a Benamidar; in fact she is a trustee holding the property on behalf of the joint family and, therefore, the trial Court as well as the High Court would have granted amendment to the plaint.

On the other hand, Shri Harish Salve, learned senior counsel appearing for the respondent, contended that in view of the specific directions given by this Court on an earlier occasion for disposal of issue No. 7 as a preliminary issue, regardless of the deficiency in the pleadings, the Court is left with no option but to proceed with the consideration of preliminary issue. At this stage finding it difficult to get along with the matter, the appellants with a view to delay the proceedings has come forward with pleadings at three different stages with different and inconsistent reliefs. Thus, it would indicate that the appellants have no consistent case. In this behalf, the amendment, if allowed, would alter the nature of the suit and character of the suit. Therefore, it would not be expedient to allow the amendment. The High Court as well as the trial Court rightly refused to grant the amendment. In view of the diverse contentions, the question that arises for consideration is : whether the High Court is right in refusing to permit the appellants to amend the plaint? It is seen that the appellants have come forward with the plea that Dr. Shanti Mathur is only a Benamidar for and on behalf of the joint family. If that be so, even the decision on which the learned counsel has placed reliance, namely, *Controller of Estate Duty, Lucknow v. Alope Mitra*, [1981] 2 SCC 121, does not help him. It is always open to the appellants, even without resorting to amendment of the plaint, to press their arguments basing on the legal effect of the benami transaction and that Dr. Shanti Mathur is a trustee of the

- A property for the benefit of the joint family. For that purpose, no express amendment is required, nor it is necessary that amendment be made in the plaint. Under these circumstances, without expressing any opinion on the amendment of the issues, it is open to the court below to proceed with the trial of the suit or to dispose of the preliminary issue No. 7 in accordance with law.
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The appeal is accordingly dismissed. No costs.

T.N.A.

Appeal dismissed.