

THE HON'BLE SRI JUSTICE Dr B. SIVA SANKARA RAO

C.R.P.No.3838 of 2015

ORDER:

This Civil Revision Petition is filed by the petitioner challenging the order and decree in I.A.No.893 of 2015 in O.S.No.36 of 2010 dated 10.08.2015 on the file of the IV Additional District Judge, Kadapa.

2. The petitioner herein is the first defendant and the respondents No.1 to 3 herein are plaintiffs in O.S.No.36 of 2010 on the file of IV Additional District Judge, Kadapa. The suit filed is for partition of plaint A,B,C,D and E schedule properties into 5 equal shares and allot 1/5th share to each of three plaintiffs and similar 1/5th share to the defendants No.2 and 3 representing their father's share. The plaint A, B, C, D and E schedule properties are described vividly.

3. The 1st defendant filed separate written statement and defendants No.2 to 4 filed separate written statements respectively, where the suit is under contest. The chief affidavit of 1st plaintiff as PW.1 was filed on 10.2.2015 after serving notice to the defendants and the same was also taken on oath by order of the Court dated 10.02.2015 and exhibited 5 documents viz certified copy of registered partition deed dated 31.10.2007, certified copy of two registered sale deeds of 1973 and 1970 respectively, Encumbrance Certificate for the period from 1983 to 2007 and Pahani copies of fasli 1422 for survey Nos.31/A and 28/B2 of Khajipet Mandal under Mee-seva respectively, and PW.1 was cross examined on 04.06.2015.

4. While so, the plaintiffs filed petition in July 2015 under Order 6 Rule 17 read with 151 CPC to amend the plaint schedules as follows:

“....Recently I was examined as PW.1 in the matter. In fact the present suit is instituted on 07.11.2008 at Kurnool on the file of District Court wherein it was numbered as O.S.No.51 of 2008. Later on, it was withdrawn on it and transferred to this Hon'ble Court, wherein it was renumbered as O.S.No.36 of 2010. While preparing the plaint by my previous advocates they disclosed property in (1) A-Schedule property at measuring Ac0.12 cents by giving door number 3/1290 and disclosing both old and new subdivisions Survey numbers and also disclosed ward number

and extent covered by open site and house, but unfortunately the boundary which relates to western side disclosed as the remaining property of B.V Venkataramana. The remaining boundaries which disclosed in the plaint schedule is intact and available on the ground and the extent correctly disclosed. Mistake the western boundary disclosed as remaining extent as if it is available. Thus there was a mistake crept by mistake, hence it made us to file this application seeking amendment.

4. So far as II-Schedule it is disclosed that an extent of Ac 0.10 cents. Infact the remaining part of the entire property which disclosed in the plaint schedule are intact available on the ground. It is well settled law boundaries will prevail over the extent. Here in the present case on hand the family has got Ac 0.15 cents in plot No.39 but where as it is disclosed as Ac 0.10 cents. In view of it to avoid unnecessary cloud in the matter now permit us to disclose the entire extent of Ac 0.15 cents by deleting Ac 0.10 cents. It will not cause any prejudice to the respondents, because it was already disclosed by boundaries.

5. (IV) D Schedule infact for D schedule property the plot No.68 and 69 are disclosed in the plaint schedule as well as survey numbers and other important particulars, but whereas it has to be disclosed as Ac 0.09 cents 440 Sq.Yards but it was wrongly noted. But correct boundaries are disclosed in the plaint schedule. It is well known principle of law that if the property is disclosed within the boundaries, the boundaries will prevail over the extent. Hence to avoid inconvenience to both the parties now we request to delete the extent which disclosed in the D schedule and insert in place an extent of Ac 0.09 cents 440 Sq Yards.

6. So far as item number of V E-Schedule wherein an error was crept in the schedule regarding the boundary shown on northern side. The remaining are intact available on the ground. It made us to seek for amendment for northern side boundary by deleting the remaining property of late B.V. Venkata Ramana and inserts in its place the property of others. The proposed amendment sought for in the present application will not change or alter the nature of the suit as well as cause of action, if it is allowed. It will certainly avoid multiplicity of the proceeding and no prejudice will be caused to respondents. These mistakes were crept at my previous advocate office by over site. The present suit is filed for partition and separate possession of our legitimate share in the property of our father and mother as such we are legally entitled. As they died intestate and these properties are self acquired properties of my father. We are legally entitled to division of property. The mistake was brought to my notice during the course of cross-examination. Hence it has become just and

essential to file this application....”

5. The defendants, particularly, 1st and 2nd defendants in opposing the same, filed their counters in the end of July 2015 and after hearing both sides, learned IV Additional District Judge by impugned order dated 10.08.2015 in I.A.No.893 of 2015 allowed the petition admitting the amendment. The order of the learned trial judge in allowing the amendment application in the operative portion reads as follows:

7.8.9.10

“...7. It is the case of plaintiffs that this suit was transferred from Kurnool and their previous counsel wrongly mentioned the Western boundary, the survey numbers, II schedule of the plaint schedule property and that the properties of D schedule and door numbers thereon are wrongly mentioned due to over sight. So, they want to amend the plaint accordingly. On the other hand the respondents contends that this is a suit of the year 2008 and the present suit is transferred to this Court five years back, already PW-1 was cross-examined at length and to fill up the lacunas in the cross-examination, the present petition is filed and sought for dismissal of the petition.

8. After hearing on both sides and after going through the record, this Court is of the considered opinion that it is not the stage to go into merits of the case. Merits or demerits of the case will be decided only after full-fledged trial.

Further, in view of the decision reported in : 2006(2) ALD 784 between **Duggumati Malakonda Reddy and another Vs. Puligunta Malakonda Reddy and others**, wherein his Lordship held that “Amendment of plaint –CPC Amendment Acts, 1999, 2002- Applicability of Provisions of amended Rule 17 of Order 6 apply to pleadings filed on or after 1-7-2002 but not to pleadings filed prior thereon-Since suit in instant case was filed on 1999, fact that trial has already commenced is, per se, not a ground to reject amendment application”, the plaintiffs are entitled for amendment of the plaint as sought for. Further by allowing the present petition, no new cause of action would arise and the nature of the suit will not change and no prejudice will be caused to the respondents. On the other hand if the petition is not allowed, the petitioners will be at logger loss than the respondents.

9. Therefore, in view of the above discussion, this Court also opines that no prejudice will be caused to defendants if the

petition is allowed by adding of the proposed paragraphs, no new cause of action would arise. So this Court inclines to allow the application.

10. In the result, this petition is allowed and the petitioners/plaintiffs are permitted to amend plaint and consequential amendment. No costs...”

6. Now the present revision is filed impugning the above order with the contentions in grounds of revision that the suit is filed in the year 2008 originally before I Additional District Judge, Kurnool and later the same was transferred to IV Additional District Judge, Kadapa. When the plaintiffs are educated and aware of the boundaries and extents, PW.1 admitted in his cross-examination that the entire suit schedule property, which fell to the share of DW.1 under a partition deed, dated 31.10.2007, however willfully excluded the property, which fell to the share of D2 to D4 and filed the present suit with false claim against the property fell to the share of D1.

7. As can be seen from cross-examination of PW.1 by D1, it is only to fill up gaps and the belated amendment sought with no due diligence, but willful and deliberate negligence, and the order of the learned trial judge in allowing the application is vitiated by material irregularity and exceeding the jurisdiction vested on him under law, which results in failure of justice, as the amendment alters the nature of suit and changes the description of boundaries, survey Numbers, Door numbers and extent of properties, and thereby, the amendment is liable to be dismissed, as contrary to the amended provision under Order 6 Rule 17 CPC. The learned trial judge grossly erred in relying upon the expression of ***Duggumati Malakonda Reddy and another Vs. Puligunta Malakonda Reddy and others.***

8. Heard both sides and perused the material on record.

9. As per Order 6 Rule 17 CPC, the expression of this Court in CRP No.1811 of 2014 dated 24.12.2014, held as follows:

“ 3) Aggrieved by the said order the Petitioners/Plaintiffs preferred the present revision contending that the Court below failed to appreciate that the mistake in the boundaries mentioned in the suit schedule is an inadvertent one and typographical error and amendment of which cannot be tested on the ground of due diligence, that soon after noticing the

typographical mistake in the plaint schedule and in the body of the plaint the application was filed and hence the concept of due diligence has no application, that the defendant did not dispute the boundaries as mentioned in the plaint in the written statement, that the only question was about non-mention of boundaries in the agreement, that the Court below erroneously found fault with the Petitioners in not getting the mistake rectified at the earlier stages of the suit while it is the specific case of the Petitioners that the mistake is typographical and it was noticed recently and seeks to allow the revision by setting aside the dismissal order of trial Court. The learned counsel during the course of arguments reiterated the same. Whereas the learned counsel for the Respondent contended that there is nothing to interfere in the order of the lower Court by this Court while sitting in the revision and prayed to dismiss the revision.

4) Now, the points for consideration are:

(i) Whether the impugned order requires interference

and if so, with what observations?

(ii) To what relief?

POINT No.1:

5) The order VI Rule 17 prior to amendment by Act 46/99 scope was vividly enlightened by several expressions of the Constitutional Courts in saying even at the stage of second appeal also amendment of pleadings can be allowed, provided it does not effect or prejudice the rights of the opposite party, muchless changes the cause of action. However, that liberal approach is curtailed by taking away the right once trial commenced by Amended Act 46/99. It is no doubt with a liberal approach to be required as procedural law is the hand maid and not mistress of justice, there was a further amendment that was proposed and ultimately came into force by amended Act 22/2002 with effect from 01.07.2002 introducing the proviso to permit amendment which could not be sought before commencement of trial despite due diligence. For more clarity, the order VI Rule 17 is required to be reproduced which reads as follows:

“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”

6) From the above, the proviso is an exception to the taking away the right of amendment once the trial is commenced, to subserve the ends of justice in saying, where 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. This is the important rider required to be satisfied, no doubt in other respects, the law existing prior to the amendment by Acts 46/99 and 22/2002 comes to the aid of the Court if that condition is satisfied. It was the interpretation initially laid down by the Apex Court in **Salem Advocate Bar Association, T.N V. Union of India** known as Salem Bar Association case-2. The said scope of order VI Rule 17 after amendment by Act 22 of 2002 with effect from 01.07.2002 was enlightened in the said expression of Salem Bar Association Case-2 supra was relied upon in **Ajendraprasadji N.Pande V. Swami Keshavprakeshdasji N.** that under the proviso no application for amendment shall be allowed after trial has commenced, unless despite of due diligence, the matter could not be raised before commencement of the trial. It is to say that once trial of the case has commenced, no application of pleadings shall be allowed unless the above requirement in the proviso of due diligence is satisfied. No doubt it was held in **Kailash V. Nankhu** that trial commences from hearing and settlement of issues and filing of chief affidavit of plaintiff. It is referring to some of the expressions among other in **Andhra Bank V. ABN Amro Bank N.V** it was held that delay itself is no ground for refusal of prayer for amendment as the only question to be considered by Court is whether such amendment would be necessary for decision of the real controversy between the parties in suit and at that stage the Court cannot go into question of merit of amendment. Once trial commenced, amendment sought, to satisfy the requirement of due diligence. It was also held by taking a similar view in the other expression in **Ramachandra Sakharam Mahajan V. Damodar Trimbak Tanksale** that when the amendment sought for would enable the Court to pinpointedly consider the real dispute between the parties and thereby help to render a decision more satisfactorily, it ought to be allowed. In **Rajkumar Gurawara (dead) through LRs V. S.K.Sarwagi & Co. Pvt. Ltd.** it was held at ParaNo.13 that though pre-trial amendments can be allowed on such terms where Court finds just, for once trial commenced the showing of due diligence as per proviso to Order VI Rule 17 C.P.C is the prerequisite. These expressions in fact say the basic requirement of due diligence is to be satisfied, once trial is commenced, though for the pre-trial amendment it can be liberal made subject to other riders. It is in the wake of the above, in **J.Samuel V. Gattu Mahesh**, it was held in paras 16 to 22 in nutshell by referring to **Ajendraprasadji** supra that the word “due diligence” is the idea that reasonable investigation is necessary before certain kinds of

relief are requested. Due diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attend an anticipatory relief. An advocate representing some one must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term due diligence is specifically used in the Code so as to provide a test for determining whether to exercise the discretion the situations of requested amendment after the commencement of trial or not. The term due diligence determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit. No doubt, typographical errors or mistakes that can be considered otherwise, however, when plaint is supposed to be signed by the party and at the advice of the counsel signed and verified the pleading by showed some attention, this omission could have been noticed and rectified there itself, that also cannot be construed as due diligence. In **Veluri Raja Rajeswari** supra this Court also held the pre-requisite where trial commenced to show due diligence for not seeking the amendment of the pleading earlier. In the later expression of this Court in **Waheeda Begum V.Md.Yakub** by referring to several expressions including the **Rajkumar Gurawara** supra particularly at para No.24 that as per the expression, it confers jurisdiction on the Court to allow either party to alter or to amend the pleadings at any stage of pleadings and on such terms as may be just, provided such amendment seeks determination of the real question and controversy between the parties; that pre-trial amendments are to be allowed more liberally, than those amendments sought to be made after commencement of the trial. It also referred **J.Samuel** supra particularly in para No.26 in saying that no application for amendment shall be allowed after the trial has commenced, unless the Court has come to the conclusion that in spite of due diligence, the party could not raise the matter before the commencement of the trial. It also referred the expression in **Rajesh Kumar Agarwal V. K.K.Modi** that the Court can take note of events subsequent to the filing of the suit, where necessary, to shorten the litigation. It is by referring to the expressions, it was held on the facts in **Waheeda begum** supra that the petitioners could establish that in spite of due diligence they could not raise the matters before commencement of trial and the bar laid down under proviso to Order VI Rule 17 C.P.C thus no way applied and consequently dismissal of the amendment petition by the trial Court is held unjustified.

8) The other decision placed reliance is of the Apex Court in **Peethani Suryanarayana V. Repaka Venkata Ramana Kishore** where it was held that Court holds power to allow such amendment, provided the application is bonafide and does not cause injustice to either side and does not affect the rights already accrued to the other side. It was on facts in the suit for partition amendment of plaint saying some typographical error is there as to subject matter that requires correction when it causes

no prejudice to the so called pendentelite purchasers of suit land by correction of survey Nos.462 and 463 from what plaint originally described of Survey No.165, when that Survey No.165 is re-assigned as 463 and the mentioning is to correct the typographical mistake. For that conclusion referred **Sajjan Kumar V. Ram Kishan** para-5 holding the amendment sought is for the purpose of bringing to the record the real question in controversy between the parties and refusal to permit the amendment would create needless complications at the stage of execution in the event of the appellant-plaintiff succeed in the suit. In fact, the boundary description survey number or boundaries if outcome of bonafide mistakes can be allowed if not come under Sections 152 or 153 C.P.C atleast under Section 151 C.P.C to subserve the ends of justice. In this regard, it was laid down way back in the expression of this Court in **Kalkonda Pandu Rangaiah V. Kalkonda Krishnaih** as follows:

“As a result of the above discussion my conclusions on the three points formulated above are as follows:- Where clerical or arithmetical mistakes occur in copying the plaint schedules from the documents anterior to the suit the proceedings in the suit can always be corrected under Section 152 C.P.C. In such cases even the documents on the basis of which the suit was filed may be amended either in a suit under Section 31 of the Specific Relief Act or in a proper case even by an application under Section 152 C.P.C provided it is a case of misdescription and not one of disputed identity. In such cases, if Section 152 is invoked it would obviate a suit which would ultimately bring the same result. In all cases, where clerical or arithmetical errors creep-in in the plaint and as a consequence in the decrees as well, they can be rectified at any time even after a final decree. A case of such an amendment petition under Section 152 C.P.C. filed in a pending suit even after a preliminary decree is passed therein is an a fortiori case”.

9) The law succinctly laid down from the expressions is that the requirement of satisfying the due diligence concept for the trial once commenced and in particular for post trial amendment is a mandatory requirement being a pre-requisite, besides the other considerations, where the amendment is necessary to resolve the real controversy and where does not cause grave prejudice or injustice to the other side and where it does not alter the cause of action or inconsistent to the existing material in the pleadings on record. It can be allowed where the amendment is necessary to explain the material on record.

10) From this undisputedly the trial is at the fag end of both suits clubbed together and the plaint schedule boundaries are disputing by the

defendants of the suit in the specific performance suit O.S. No.585 of 2007 and the same is there also in the evidence on plaintiff's side of O.S. No.417 of 2007 where the suit in O.S.No.585 of 2007 clubbed with for joint trial and the defendants in O.S. No.585 of 2007 let in evidence as D.Ws 1 and 2 and also on their side D.Ws 3, 4 and 5 examined and the plaintiff in O.S. No.585 of 2007 as D.W-1 in the chief examination not explained the same. It is no doubt, the contention of the revision petitioner who is the plaintiff in O.S. No.585 of 2007 in seeking amendment of the two of the boundaries to the plaint schedule supra is that it could not be noticed even at that stage and it is only in the cross-examination page No.36, para No.2 it was elicited and in page 26, Para No.3 of the written statement of the defendants in O.S. No.585 of 2007, the defendants did not even dispute the boundaries. It is in fact, the proposed amendment sought for is not for Eastern and Western boundaries, but for North to change as South and South to change as North and not even to introduce any new names, but for saying the mistake occurred by inadvertence and unnoticed. It is no doubt true in the so called agreement for sale of which the suit for specific performance of O.S. No.585 of 2007 maintained, the sale agreement does not contain boundaries and it is only in the plaint it is specified as part of S.No.295 admeasuring Ac.0-20 guntas within the four boundaries and now sought for amendment of the boundary name mentioned as North as South and South as North. From this, there is nothing to show what grave prejudice being caused to the defendants in O.S. No.585 of 2007 or plaintiffs in O.S. No.417 of 2007 when they are disputing the very contract for sale in favour of plaintiff in O.S. No.585 of 2007 and its enforceability and not even admitting of sale is only within the boundaries and by change of the Northern to Southern and Southern to Northern, it is inconsistent to the stand already taken in the plaint pleadings or causes thereby any grave prejudice to the opposite party. When such is the case, the amendment when required to resolve the real controversy and to avoid future complications in the event of success in execution or the like. It is clearly stated that it could not be noticed before pre-trial stage, that too when the defendants' written statement in O.S. No.585 of 2007 no way disputed the boundaries and its correctness. Thus, it can be said that the plaintiff in O.S. No.585 of 2007 could not seek the amendment before commencement of trial despite due diligence, as it is noticed from the evidence let in, in the suits clubbed together after commencement of trial and when it is to resolve the real controversy as per the plaintiff in O.S. No.585 of 2007 and when delay itself is not a ground to reject the amendment, the trial Court ought to have allowed the amendment, when it no way causes withdrawal of any inconsistent admission in the pleadings or grave prejudice to other side or changes the cause of action or nature of suit, but for the said delay to compensate. The lower Court's order dismissing the amendment application now sought to be intervened in the revision within its limited scope for saying is improper exercise of jurisdiction vested and when it causes prejudice to the revision petitioners/plaintiffs in O.S. No.585 of 2007, this Court has to

interfere to set aside the order impugned in the order vide **Shalini Shyam Shetty V. Rajendra Shankar Patil** that was followed in **Sameer Suresh Gupta V. Rahul Kumar Agarwal**”

10. From above propositions and coming to the facts, it is not a mere mistake or mis-description of only one boundary in one item of the plaint schedule. So far as the ‘A’ schedule property is concerned, it is a wrong description of the western boundary instead of B. Siva Ramulu it is shown as B.V.V. Ramana and that sought for correction, that can be permitted, and so far as ‘B’ schedule, it is claimed that instead of 15 cents, it is shown as 10 cents, and boundaries are correctly mentioned, thereby, as per the settled law, boundaries will prevail over survey number and extents, the same can be corrected for no change of boundaries and so far as plaint ‘D’ schedule, it is claimed the extent wrongly mentioned, though the boundaries and survey numbers of plot numbers given, same also can be corrected, and so far as ‘E’ schedule, for correction of one of northern boundary, and thereby, as can be seen, it will not change or alter the nature of the suit or against the action and no prejudice, that practically can be caused. So far as due diligence part concerned, as per the expression supra and in the facts, the first plaintiff in the affidavit stated that while preparing the plaint, the earlier advocate described the property mistakenly and the mistake inadvertently crept in. In fact as referred supra, from the expression in **Kalkonda Pandu Rangaiah’s** case, the clerical and Arithmetical errors, which are crept in the plaint can be corrected even after passing of decree.

11. It is not the case of adding or including of any new property or setting up of new cause of action or deleting existing cause of action and setting up any contrary or inconsistent stand, much less, any way prejudice defence of the accused.

12. Having regard to the above, the amendment that can be considered for allowing though with heavy costs. However, the learned trial judge did not apply his judicial mind and did not discuss anything in the order even formulated the point for consideration at para-6, but simply referred the decision in **Duggumati Malakonda Reddy** case (1 supra), where the suit was filed prior to the Order 6 Rule 17 amendment petition and it was held therein that suits pending were already amended under the provision rigorous of diligence by proviso Order 6 Rule 17 has no application.

13. It is unknown how that proposition is applicable to the case on hand, even as from the order, at para No.7 last but 4th line speaks the factum of the suit originally filed in the year 2008 was numbered as O.S.No.57 of 2008 and later renumbered as O.S.No.36 of 2010. To say the suit is subsequent to the amendment. The learned judge should have observed that it has no application, but wrongly relied on a different foot.

14. Having regard to above, the order in I.A.No. 893 of 2015 in O.S.No.36 of 2010 dated 10.08.2015 is liable to be set aside only on that ground and to be remitted back to the learned trial judge to hear afresh and with reasons and pass orders on own merits.

15. With the above observations, this Civil Revision Petition is disposed of by remanding the matter to the trial Judge for fresh disposal with reasons and on merits. No costs. Miscellaneous petitions, if any pending in this Petition, shall stand closed.

JUSTICE Dr B. SIVA SANKARA RAO.

Date : 16 -11-2015

Gvl