

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.2407 of 2015

ORDER:

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This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful petitioner/2nd defendant is directed against the orders dated 30.04.2015 of the learned Additional Senior Civil Judge, Machilipatnam of Krishna District passed in IA.no.408 of 2015 in OS.no.82 of 2007 filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 requesting to permit the 2nd defendant to amend the written statement by adding paragraph 5(a) in the written statement and carry out consequential amendment as stated in the petition list.

2. I have heard the submissions of the learned counsel for the revision petitioner/2nd defendant ('the 2nd defendant', for brevity) and the learned counsel for the 1st respondent/plaintiff ('the plaintiff', for brevity). I have perused the material record.

3. To begin with, the case of the 2nd defendant, in brief, is as follows:

The plaintiff brought the suit against the 2nd respondent herein/1st defendant and the 2nd defendant for eviction from the plaint schedule property and for other reliefs. The 2nd defendant filed a written statement. Before filing the suit, a reply notice, which is marked as exhibit A10, was given by the 2nd defendant. In that reply notice a specific plea that the 2nd defendant had perfected her title by adverse possession is taken. However, inspite of due diligence the 2nd defendant could not take the said plea in the said words in the written statement by stating that she had perfected her title by adverse possession. However, she had taken the said plea in the reply notice under exhibit A10. Therefore, she had filed the aforementioned petition for amendment of the written statement for permission to incorporate paragraph 5(a) and consequently amend the written statement as stated in the petition

list.

3.1 In order to complete the narration of facts, it is necessary to first refer to the proposed amendment, which reads as follows:

“Proposed amendment:

Add para 5(a) as: The defendant submits that, she has perfected her title by adverse possession as she is in possession and enjoyment of the property since more than three decades and that the Plaintiff is hostile towards the enjoyment of the Defendant and the enjoyment of the Defendant is open, continuous, uninterrupted and the same is well within the knowledge of the Plaintiff by his behavior hostile to the enjoyment of the Defendant. Hence, the Defendant perfected her title by adverse possession.”

[Reproduced verbatim]

4. The plaintiff having filed a counter resisted the application of the 2nd defendant *inter alia* contending as follows:

The material allegations in the affidavit filed by the 2nd defendant in support of the petition are false. The suit was posted for arguments on the side of the defendants. The plaintiff had already filed his written arguments. At the stage of arguments, the present petition is filed for amendment of the written statement. The written statement was filed on 28.08.2007. The plaintiff filed the reply notice under exhibit A10 along with the plaint. The petition is filed after closure of the arguments on the side of the plaintiff only to protract the litigation with diabolical plans. The 2nd defendant is debarred from seeking the amendment in view of the proviso to Order VI Rule 17 of the Code. Once the trial had commenced any amendment cannot be permitted unless the party seeking the amendment establishes that he/she could not seek the amendment earlier despite due diligence. The amendment being sought for at the belated stage cannot be permitted.

5. On merits, the Court below had dismissed the petition of the 2nd defendant. Therefore, the 2nd defendant is before this Court.

6. The learned counsel for the 2nd defendant while reiterating the pleaded

case of the 2nd defendant and the grounds urged in the petition had contended as follows:

The 2nd defendant having filed her written statement is seeking amendment of the written statement only to permit her to take the plea of adverse possession. The 2nd defendant is raising the said plea as an alternative plea. It is neither inconsistent nor contrary to the original pleadings. The Court below ought to have permitted the 2nd defendant to amend the written statement as the law empowers the Court to permit amendment at any stage of the proceeding. The only requirement is that the party seeking amendment must seek the leave of the Court. The present application is filed for seeking the leave of the Court for amendment of the written statement. The legal requirements are satisfied. The Court below was in error in holding that the 2nd defendant is not diligent in approaching the court. The Court below ought to have seen that the rules of procedure are only handmaid of justice and that the amendment is necessary for resolving the real dispute involved in the *lis* and that the 2nd defendant cannot be disallowed from raising an important and essential issue as a part of her defence. Even if the proposed amendment has the effect of raising a conflicting plea, that by itself would not constitute a ground to reject the amendment. The scope of Order VIII Rule 9 is different from Order VI Rule 17. Under Order VIII Rule 9 of the Code, no pleading subsequent to the written statement of a defendant other than by way of defence to set off or counter claims shall be presented except by the leave of the Court and upon such terms as the Court thinks fit; but, the Court may at any time require a written statement or additional pleading from any of the parties and fix a time of not more than 30 days for presenting the same. The Court may permit any amendment which is necessary for the purpose of determining the real questions in controversy and the merits of the amendment sought for shall not be adjudicated at the stage of allowing the prayer for amendment. The court should be extremely liberal in granting amendment. The amendment being sought is only to introduce a plea that was already taken in the reply notice.

By way of the proposed amendment, the defendant is not introducing a new case. Since the evidence is already comprehensively adduced, even if the amendment is permitted the amendment would not necessitate further trial. The law is settled that even if an amendment is barred by law of limitation, the amendment should be allowed leaving open the mixed question of fact and law in regard to limitation to be adjudicated in the main proceeding. Since on the aspect stated in the proposed amendment the necessary evidence is already adduced and was brought on record, it cannot be said that the issue of adverse possession being sought by way of amendment is new to the plaintiff. There was only an omission in the written statement about mentioning the legal plea of adverse possession by employing the required words. Therefore, the necessity for seeking the amendment has arisen. By refusing to grant the amendment, the 2nd defendant cannot be deprived of his right to raise a defence of adverse possession, which is available to him and which is already specifically stated in reply notice under exhibit A10. The amendment is only to clarify the defence by employing the required words in the defence.

6.1 The learned counsel for the 2nd defendant placed reliance on the following decisions.

(i). The decision in **Jagath Swapna and Company v. Church of South India Trust Association**^[1] is relied upon in support of the plea that an amendment of the pleading can be permitted to take a legal plea when there is an omission of legal plea in the original pleading.

(ii). The decision in **South Konkan Distilleries v. Prabhakar Gajanan Naik**^[2] is relied upon in support of the contention that when an amendment does not constitute the addition of a new cause of action or raise a different case but amounts merely to a different or additional approach to the same facts, the amendment is to be allowed even after the expiry of statutory period of limitation.

(iii). **Rajesh Kumar Aggarwal v. K.K. Modi**^[3] is relied upon in support of the proposition that 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.

(iv). Nannapaneni Sowbhagyamma v. Nannapaneni Rama Rao ^[4]

is relied upon to bring to the notice of the Court the scope of Order VIII Rule 9 vis a vis the scope of Order VI Rule 17.

(v). In A. Krishna Rao v. A. Narahari Rao ^[5] it is held that even if the proposed amendment has the effect of raising a conflicting plea, that by itself would not constitute ground to reject the amendment, for it is for the plaintiff to ultimately justify his pleadings and prove the same with reference to evidence.

7. On the other hand, the learned counsel for the plaintiff while supporting the orders of the Court below and while reiterating the case of the plaintiff had forcefully contended that the petition for amendment of the written statement is filed by the 2nd defendant at a highly belatedly stage, that is, when the suit is posted for hearing the arguments on the side of the defendants after the closure of the arguments on the side of the plaintiff and that, therefore, the 2nd defendant is debarred from seeking the amendment of the written statement in view of the bar contained in the proviso to Order VI Rule 17 of the Code. In support of the contention that the suit is at the advanced stage of arguments a copy of the proceedings sheet showing the history of the case hearings is filed before this Court.

8. I have gone through the pleadings of the parties in the subject interlocutory application and I have given earnest consideration to the facts and the submissions.

9. Dealing first with the aspect of delay and the bar under the *proviso*, appended to Order VI Rule 17 of the Code, it is to be noted that the suit is at the stage of arguments is not in dispute. A perusal of the copy of the proceedings sheet filed on behalf of the plaintiff would indicate that the suit was for the first time posted for arguments on 04.02.2015 and was adjourned from time to time for hearing arguments up to 16.03.2015. Subsequently, the suit was adjourned from 18.03.2015 onwards by noting 'call with IAs'. The IA seeking the amendment of the written statement was filed before the trial court on 22.04.2015. Thus, as on the date the said application was filed the suit is at the stage of hearing arguments and hearing of the arguments has

not commenced. Be that as it may. The 2nd defendant is resisting the suit of the plaintiff filed for eviction and other reliefs. By way of the proposed amendment she intends to now take specifically the plea of adverse possession. The details of the proposed amendment as stated in the petition are already extracted supra while adverting to the case of the 2nd defendant. The only ground on which the plaintiff is opposing the request of the 2nd defendant for amendment of the written statement is that the request is made at a highly belated stage when the suit is at the stage of arguments and that the *proviso* to Order VI Rule 17 of the Code debars the defendant from seeking the amendment as the trial has commenced and concluded and the suit is at the stage of arguments.

10. In this backdrop of facts and contentions it is profitable to refer to the legal position.

In **Rajkumar Gurawara (dead) through LRs v. S.K.Sarwagi and Company**

Private Limited and another ^[6] the Supreme Court having referred to Order VI Rule 17 of the Code had held as follows:

“Further, it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition filed during the course of the arguments, he prayed for recovery of possession and damages from the second defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation.”

Before proceeding further, it is necessary to refer to the proviso to Order VI Rule 17 of the Code 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.”

In the decision in **VIDYABAI V/s. PADMALATHA**^[7] the Supreme Court observed that proviso to Order VI Rule 17 of the Code is couched in a mandatory form and, therefore, the court's jurisdiction to allow an application for amendment is taken away there under unless the conditions precedent therefor are satisfied, and that before allowing amendment, the Court 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 and that it is the primary duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties and only if such a condition is fulfilled, the amendment is to be allowed. Thus, the proviso appended to Order VI Rule 17 of the Code was held to restrict the power of the Court and that it placed an embargo on exercise of its jurisdiction and that unless the jurisdictional fact as envisaged therein is found to exist, the court would have no jurisdiction at all to allow the amendment.

In **REVAJEETU BUILDERS V/s NARAYANA SWAMY**^[8], on an analysis of English and Indian case law, the Supreme Court carved out the following principles which should weigh with the Court while dealing with an application for amendment:

- (1) **Whether the amendment sought is imperative for proper and effective adjudication of the case;**
- (2) **Whether the application for amendment is *bona fide* or *mala fide*;**
- (3) **The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;**
- (4) **Refusing amendment would in fact lead to injustice or lead to multiple litigation;**
- (5) **Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and**
- (6) **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.**

The Supreme Court, however, clarified that the above principles were illustrative and not exhaustive.

In **CHANDER KANTA BANSAL V/s. RAJINDER SINGH**^[9], the Supreme Court, taking note of the fact that 'due diligence' has not been defined in the Code, referred to the dictionary meaning of 'diligence' which is to the effect that it means careful and persistent application or effort or a continual effort to accomplish something; care; caution; the attention and care required from a person in a given situation, and observed that 'due diligence' means the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. Reference was also made to 'Words and Phrases' by Drain-Dyspnea (Permanent Edition 13-A) wherein 'due diligence' was defined in law to mean doing everything reasonable and not everything possible. The Hon'ble Supreme Court, therefore, concluded that 'due diligence' would mean reasonable diligence and would mean such diligence as a prudent man would exercise in the conduct of his own affairs.

Further, in the decision in **Abdul Rehman and Another v. Mohd. Ruldu and Others**^[10], the Supreme Court, having taken note of the above provision of law had laid down that it is clear that the parties to the suit are permitted to bring forward amendment of the pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them and that the Courts have to be liberal in accepting the same, if such application for amendment is made prior to the commencement of the trial and that if such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that, inspite of due diligence, the party could not have raised the matter before the commencement of the trial. In the above decision the Supreme Court reiterated the following proposition:

“All amendments which are necessary for the purpose of determining real questions of controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.”

In the above decision the Hon'ble Supreme Court further referred to the ratio in the decision in **Pankaja and another v. Yellapa**^[11], which runs as follows:

“If the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed.”

In **Pankaja and another (11 supra)** the facts are as under: “As per the case of the plaintiffs, the defendant, in violation of the Court order, had further encroached into the suit property. Therefore, the plaintiffs sought for the amendment of the plaint for seeking the reliefs of declaration of ownership and possession of the said encroached area also. The said application was allowed by the trial Court. However, the Principal Civil Judge rejected the application for amendment on the ground that the application for amendment was filed at a belated stage. The High Court dismissed the revision on the said ground and also on the ground that the amendment introduces a different relief than what was originally asked for. The Supreme Court permitted the amendment by allowing the appeals.

In **Sampath Kumar v. Ayyakannu and another**^[12] the facts and ratio are as under: “A suit was brought in the year 1988 for perpetual injunction in respect of an agricultural land. Before the commencement of the trial in the year 1999, the plaintiff moved the application for amendment of the plaint alleging that during the pendency of the suit, the defendant had forcibly disposed the plaintiff in the year 1989. On such averments the plaintiff sought for the relief of declaration of title to the suit property and consequential relief of recovery of possession. The defendant opposed the application of the plaintiff stating that he had perfected title to the property by adverse possession and that the suit is barred by law of limitation and that a valuable right that had accrued to the defendant is being sought to be taken away by proposed the amendment. The trial Court rejected the application for amendment observing that the appropriate course for the plaintiff was to bring a new suit. The High Court maintained the said order. The Supreme Court

while allowing the appeal of the plaintiff had referred to its earlier decisions and had finally held as follows:

8. ***Mst. Rukhmabai v. Lala Laxminaraya and Ors.***: [1960]2SCR253, this Court has taken the view that where a suit was filed without seeking an appropriate relief, it is a well settled rule of practice not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.

9. Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amendment. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observations in ***Siddalingamma and Anr. v. Mamtha Shenoy***: AIR2001SC2896.

11. In the present case the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged

at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

In **Andhra Bank v. ABN Amro Bank N V and others**^[13] it was held that it is well settled that delay is no ground for refusal of prayer for amendment and that it is permissible in law to permit to amend the written statement and allow an additional ground of defence to be taken.

In **Basavan Jaggu Dhobi v. Sukhanandan Ramdas Chaudhary**^[14] it is held to the effect that it is open to the defendant to take even contrary stands or contradictory stands and that thereby cause of action is in any manner affected and that the issue of cause of action being affected will apply only to a case of a plaint being amended for introducing a new cause of action.

In **Usha Balashaheb Swami and others v. Kiran Appaso Swami and others**^[15] it is held that it is well settled principle that a prayer for amendment of the plaint and a prayer for amendment of written statement stand on different footings and that the general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of the claim applies to amendments to plaints and it has no counter part in the principles relating to amendment of written statements and that, therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding or altering or substituting a new cause of action in the plaint may be objectionable.

11. Reverting to the facts of the instant case, it is to be noted that according to the 2nd defendant, she is not introducing a new defence and that the 2nd defendant had taken the necessary plea of adverse possession in exhibit A10 reply notice, but, the defendant could not take the said plea in the written statement in the words that the defendant had perfected title by adverse possession and that the necessary evidence is already adduced and that there is no need to reopen trial to adduce further evidence even if the 2nd defendant is permitted to amend the written statement as now being sought for. Though, the trial in the suit had concluded, be it noted that in view of the contentions of the 2nd defendant that are advanced before this Court, there is no need to reopen the trial of the suit even if the amendment is permitted. Further, though the suit is at the stage of arguments, as per the submissions, the evidence in support of the proposed amendment is also already brought on record. The ratios in the decisions support the plea of the 2nd defendant that an amendment cannot be refused merely on the ground of delay and that an amendment can be permitted if it is intended to determine the real question in controversy; and, all amendments, which are necessary for the purpose of determining the real questions of controversy between the parties, should be allowed if such amendments sought for do not change the basic nature of the defence. Dealing further with the aspect of delay, on the basic facts, which are pleaded in the affidavit in support of the petition for amendment of the written statement to enable the 2nd defendant to take the plea of adverse possession by employing specific words, this Court is of the considered view that it would be a sound exercise of discretion to permit amendment of the written statement and that on the ground of mere delay amendment cannot be refused. Since the dominant purpose of the Rule is to minimize the litigation and to enable the parties to have all the issues relating to one dispute resolved in one suit, the amendment sought for by the 2nd defendant can be allowed, in the considered view of this Court. As rightly pointed out, the question whether the 2nd defendant would be entitled to succeed on the proposed defence now being introduced by way of proposed

amendment cannot be prejudged while considering an application, which is filed for seeking the amendment of the written statement. The amendment, even if permitted at this belated stage, helps in setting at rest the dispute between the parties once and for all. Further, if granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed and the court has also to consider whether the proposed amendment is intended to determine the real dispute between the parties. If the proposed amendment is allowed, no right accrued to the plaintiff would get defeated as the 2nd defendant is denying the claim of the plaintiff from the beginning and is contending that the plaintiff is not entitled to any reliefs. Further, the ratios in the decisions support the case of the 2nd defendant that the 2nd defendant can by way of an amendment to the written statement add a new ground of defence or substitute or alter a defence or take an inconsistent plea and the same is not objectionable. In view of the ratios in the decisions which are squarely applicable to the facts of the case, this Court is of the considered view that the amendment sought for by the 2nd defendant can be permitted in the facts and circumstances of the case and that, therefore, the order of the court below brooks interference.

12. Having regard to the facts and the above said reasons, this court finds that the order impugned is liable to be set aside.

13. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.408 of 2015 in OS.no.82 of 2007 is allowed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision, shall stand closed.

JUSTICE M. SEETHARAMA MURTI

1st June, 2016
Vjl

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- [\[1\]](#) AIR 2011 AP 81
- [\[2\]](#) AIR 2009 SC 1177
- [\[3\]](#) AIR 2006 SC 1647
- [\[4\]](#) 2015(4) ALD 477
- [\[5\]](#) 2014(6) ALD 258
- [\[6\]](#) (2008) 1 SCC 364
- [\[7\]](#) (2009) 2 Supreme Court Cases 409
- [\[8\]](#) (2009) 10 SCC 84
- [\[9\]](#) (2008) 5 SCC 117
- [\[10\]](#) 2013(1)ALD 1(SC)
- [11] AIR 2004 SC 4102
- [\[12\]](#) (2002) 7 SCC 559
- [\[13\]](#) (2007) 6 SCC 167
- [\[14\]](#) 1995 Supp (3) SCC 179
- [\[15\]](#) (2007) 5 SCC 602