

HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

C.R.P.Nos.2091 and 2228 of 2016

COMMON ORDER:

These two revisions are filed, under Article 227 of the Constitution of India, by the unsuccessful 2nd petitioner/plaintiff, assailing the orders, dated 24th February, 2016, in I.A.Nos.45 of 2016 and 46 of 2016 passed by the learned I Additional Junior Civil Judge, Chittoor, filed respectively for reopening the suit and for amendment of the plaint.

2. I have heard the submissions of Sri V.S.R.Anjaneyulu, learned counsel appearing for petitioners and of Sri O.Udaya Kumar, learned counsel appearing for respondents.

3. I have perused the material record.

4. The facts, which are necessary to be stated as a prelude to this order, in brief, are as follows:

“The sole plaintiff brought the suit against the defendants seeking the following reliefs:

- “a)granting permanent injunction restraining the defendants, their men and agents from in any manner interfering with the 2nd plaintiff's possession of the plaint 'A' schedule mentioned vacant site;
- b) declaring that the passage between points D, D1, E, E1 is exclusive passage of the 2nd plaintiff, which is more fully described in plaint 'B' schedule, and for permanent injunction restraining defendants from interfering with possession of the same;
- c) declaring that the passage between points E, F and G, H is common passage, which is more fully described in plaint 'C' schedule.

- d) granting mandatory injunction directing the defendants to remove the encroachments made by them shown in red wash to a width of 8 feet and length of 40 feet, in plaint 'B' schedule;
- e) granting permanent injunction, restraining the defendants from in any manner obstructing the free ingress and egress of the 2nd plaintiff through the common passage between points G, H and E, F more fully described in plaint 'C' schedule;
- f) directing the defendants do pay the 2nd plaintiff the costs of the suit.””

The 1st defendant filed written statement denying the claims of the plaintiff. During the pendency of the suit, the sole plaintiff died and the 2nd plaintiff was impleaded as per orders dated 15.10.2009 in I.A.No.273 of 2009. It is pertinent to note that insofar as plaint 'A' schedule property is concerned, in the original plaint, a perpetual injunction to restrain the defendants and their men and agents from interfering with the 2nd plaintiff's possession of the plaint 'A' schedule property was sought and the said property is a vacant site. During the course of trial, application in I.A.No.86 of 2014 was filed for recalling PW-1, *inter alia*, stating that the 1st plaintiff died after filing of the suit, and that thereafter, the 2nd plaintiff came on record and he was examined as PW-1 and that in his deposition, by mistake, he stated that the original suit was filed for declaration of title and delivery of possession and that the same was not correct, and, therefore, to correct the said mistake in his deposition, he may be recalled. That application was resisted by the defendants and was eventually dismissed by the trial Court. In the revision in C.R.P.No.1415 of 2014, this Court, while confirming the orders of the trial Court, in the operative portion of the order, dated 21.12.2015, observed verbatim as follows:

“It is for the parties to advance arguments in the matter based on the oral and documentary evidence as well as pleadings in support of their respective claims and based on the same, the Court had to take a decision. If there are any inconsistent issues in the oral and documentary evidence and pleadings, it is open for the respective parties to advance their respective arguments on the said issue. Merely because, a witness wrongly deposed, the so-called witness cannot be called for further examination in that regard.”

Thus, while disposing of the revision, this Court made observations to the effect that for a wrong statement made in the deposition of the witness, the witness need not be recalled and that the parties are at liberty to advance arguments based on the oral and documentary evidence as well as pleadings made in support of their respective claims and based on the same, the Court is obligated to take a decision and if there is any inconsistency on the aspects in the oral and documentary evidence and pleadings, it is open for the respective parties to advance their respective arguments on the said aspects. After the dismissal of the said revision, the 2nd plaintiff filed these two applications, one for reopening the matter, which is at the stage of arguments, and the other for amendment of the plaint. Both the applications were resisted by the defendants. And, on merits, the trial Court dismissed both the applications. Hence, these two revisions are filed by the 2nd plaintiff.

5. Before proceeding further, it is necessary to refer to the pleadings of the parties in the subject interlocutory applications.

6. The case of the 2nd plaintiff is this: “During the course of his cross-examination, he gave evidence that the 1st plaintiff filed the suit for delivery of possession of the plaint ‘A’ schedule property, which is not correct; hence,

he filed a petition to recall him to clarify the said ambiguity; the said petition was dismissed by the trial Court and the order of the trial Court was confirmed by this Court in the revision. To avoid further complications, though the suit is filed for declaration in respect of plaint 'A' schedule vacant site and for grant of perpetual injunction, in the alternative, the plaintiff seeks the relief of delivery of possession of plaint 'A' schedule vacant site, in case the (trial) Court does not believe that the 2nd plaintiff is in possession; the proposed amendment will not cause any loss or injury to the defendants; the proposed amendment is not barred by law of limitation since the suit is pending; the 2nd plaintiff is still in possession of plaint 'A' schedule vacant site and the said aspect is a subject matter of appreciation of evidence by the trial Court; the delay in seeking the amendment is neither wilful nor wanton." Pleading so, the plaintiff sought the following amendments:

"Add the following Paragraph as Para 20(a) :-

2nd plaintiff reiterates that 1st plaintiff and after her, 2nd plaintiff have been exclusive possession and enjoyment of plaint schedule property. In the event this Hon'ble Court comes to conclusion that plaintiffs are not in possession of the plaint schedule land, alternately plaintiff prays for delivery of plaint 'A' schedule property by directing the defendants to deliver possession of plaint schedule property.

Include the following Paragraph in prayer column in Para 21(a)

Declaring the plaintiffs right and title over the plaint 'A' schedule mentioned property and

At the end of Para 21 (a) :-

In alternate directing the defendants to deliver possession of plaint 'A' schedule site in the event this Hon'ble Court comes to conclusion that plaintiff is not in possession."

7. The case of the respondents/defendants in the counter, in brief, is this :

"The material allegations in the affidavit filed in support of the petition are

false; the 2nd plaintiff earlier filed a petition to recall him; even in the affidavit he did not take a plea of incorrect recording of evidence; the Presiding Officer, who has recorded the evidence, disposed of the said application; it is now not open for the 2nd plaintiff to contend to the contrary; the suit is at the stage of arguments; since the false plea of the plaintiff about the alleged possession is exposed by an admission, which was gained in the cross-examination of PW-1, the present applications are filed to nullify the said admissions; if the amendment is allowed, lot of prejudice will be caused to the defendants; it is not possible to continue the suit with the same pleadings; the contention that no additional pleadings and no additional evidence are required, is not correct; the suit is of the year 2002; the prayer for declaration and recovery of possession in respect of plaint 'A' schedule property was being sought after lapse of 14 years, therefore, it is not correct to contend that the proposed amendment and the proposed relief claimed are not barred by law of limitation; the 2nd plaintiff is claiming inconsistent reliefs; in the earlier proceedings between the parties, the District Judge, while disposing of the civil miscellaneous appeal, directed the trial Court to dispose of the suit with certain directions; subsequently, the trial has commenced; after the trial is concluded, the petitions, which are vexatious, are filed; the 2nd plaintiff made allegations against the Presiding Officer of the trial Court; the said Presiding Officer was transferred; subsequently the transfer petition was dismissed; the petitions are filed to protract the litigation.”

8. At the hearing, the learned counsel for the 2nd plaintiff, while reiterating the case of the 2nd plaintiff, would contend as follows: “The sole

plaintiff brought the suit; and on her death, the 2nd plaintiff was brought on record; he is not aware of the relief claimed in the suit as he was subsequently brought on record; he made a wrong or inadvertant admission that the suit is filed for delivery of possession. The said statement is not correct; when an application is filed to recall the said witness to enable him to correct the said mistake, the said petition was dismissed; this Court in revision, gave liberty to advance arguments based on oral and documentary evidence and further observed that the trial Court would decide the matter on such arguments; if the trial Court takes a view that the 2nd plaintiff is still in possession of the plaint 'A' schedule property, the 2nd plaintiff would be entitled to succeed; however, after hearing the arguments, while appreciating the evidence brought on record, if the trial Court takes a view that the 2nd plaintiff is not in possession of the plaint 'A' schedule property, then it would be necessary for the 2nd plaintiff to seek the relief of declaration and recovery of possesison of plaint 'A' schedule property in order to succeed in the suit; therefore, for abundant caution, while seeking declaration of title and retaining the relief of confirmation of possession, the plaintiff is further seeking the relief of recovery of possession, alternatively, in view of the statement made by him in his deposition; the proposed amendment does not require any further evidence to be adduced and the suit can be disposed of based on the evidence already brought on record; the issue of limitation in regard to the proposed amendment, if permitted, being a mixed question of fact and law, has to be considered at a later stage but not while considering the merits of the application seeking amendment; the trial Court erroneously dismissed the applications for reopening the matter and permitting the 2nd

plaintiff to amend the plaint; the amendment sought is necessary for effective adjudication of the *lis* and giving a quietus to the dispute between the parties, once and for all.”

9. *Per contra*, learned counsel for respondents/defendants, while reiterating the case of defendants, which is stated supra, and while supporting the orders of the Court below, drew the attention of this Court to the pleadings of the parties in the earlier interlocutory application filed for recalling the PW-1, wherein, it is stated by the 2nd plaintiff in the affidavit that the suit is filed for declaration and delivery of possession while, in fact, the suit in respect of plaint ‘A’ schedule property was instituted for perpetual injunction and further submitted that the attempt earlier made to recall PW-1 *inter alia* contending that a wrong statement was made in the deposition, was negated by the trial Court and that the said order of the trial Court was confirmed by this Court and that the amendment being sought 14 years after the institution of the suit for declaration of title and confirmation of possession and alternatively for recovery of possession is barred by law of limitation in view of Article 58 of the Indian Limitation Act and that the amendment being sought at the stage of arguments is barred under the proviso to Order VI Rule 17 of the Code of Civil Procedure, 1908, and hence, the amendment cannot be permitted. He would further submit that if the amendment is permitted, the defendants would be required to file additional pleadings and that framing of additional issues and adducing additional evidence would also be necessary, and therefore, at this belated stage, if the amendment is permitted, it will delay the disposal of the suit.

10. I have bestowed my attention to the facts and submissions.

11. Since the facts and contentions are already stated, in detail, there is no need to dilate on the said aspects once again. Be it noted that insofar as the plaint 'A' schedule property is concerned the suit is originally instituted by the sole plaintiff for perpetual injunction *inter alia* claiming that it is a vacant site. The defendants are resisting the suit. As the sole plaintiff died, the 2nd plaintiff was brought on record. The genesis of the present *lis* before this Court is a statement made by PW-1 in his evidence that the suit was originally brought for delivery of possession though the suit was filed for perpetual injunction. When an attempt was made by the 2nd plaintiff (PW-1) to recall him to correct the said part of the deposition by stating that it is a wrong or inadvertent statement, the trial Court did not allow the request of the 2nd plaintiff for recalling him; however, this Court, as already noted, directed the parties to advance arguments based on their pleadings and evidence brought on record and left the matter for appreciation of the evidence by the trial Court at the time of deciding the suit on the issues settled for determination. In that view of the matter, the 2nd plaintiff now filed the subject applications, one to reopen the matter and the other to amend the plaint. The proposed amendments are already extracted supra. The 2nd plaintiff now states that in view of the statement made by him in the deposition, it is necessary to seek amendment of the plaint and claim a relief of declaration in addition to the confirmation of possession besides the alternative relief of recovery of possession, in case the trial Court comes to the conclusion that the 2nd plaintiff is out of possession. As rightly pointed out by the learned counsel appearing for the plaintiff, ultimately, what view

the trial Court would take after appreciation of evidence, cannot be visualised at this stage. If the trial Court takes a view that the statement made by PW-1 in his evidence is correct and it is not an inadvertent statement, then the suit for injunction is liable for dismissal. However, if after considering the entire evidence brought on record in juxtaposition with the pleadings, the trial Court takes the view that the 2nd plaintiff is in possession of the plaint 'A' schedule property despite his statement in the deposition, then the 2nd plaintiff, in all probability, would be entitled to a decree insofar as the perpetual injunction in respect of plaint 'A' schedule properties are concerned. Therefore, on appreciation of evidence, when two views are possible, the trial Court may take any one of the views, eventually. In that view of the matter, the 2nd plaintiff, for abundant caution, seeks declaration of title while retaining the relief of perpetual injunction in the form of confirmation of possession and alternatively seeks the relief of recovery of possession. Therefore, in the facts and circumstances of the case, *prima facie*, the 2nd plaintiff's effort to seek amendment cannot be termed as *mala fide* and it appears, on the face of it, to be *bonafide*.

12. However, before proceeding further, it is necessary to consider certain legal aspects. The first contention of the defendants is that the amendment sought at the stage of arguments of the suit is barred by the proviso to Order VI 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.”

A plain reading of the provision shows that it is the duty of the plaintiff seeking amendment, once trial has commenced, to plead and establish that in spite of due diligence, he could not have raised the matter earlier. In the case on hand, the amendment has become necessary, in the considered view of this Court, in view of the orders of this Court in the revision wherein the matter was left to the final decision to be taken in the suit by the trial Court after appreciation of evidence. Therefore, the basis for amendment is a subsequent event, in the well considered view of this Court. The orders of this Court in the revision were passed on 21.12.2015 and the present applications are filed in February 2016; therefore, in the considered view of this Court, the bar under proviso to Order VI Rule 17 has no application to the present case. Therefore, the ratios in the following decisions - (i) **P. Prakash v. Poosa Muthyalu and others** [2015 (5) ALD 19]; (ii) **J. Samuel and others v. Gattu Mahesh and others** [(2012) 2 SCC 3000]; (iii) **Pochareddy Srihari Reddy v. Veeriboina Harikrishna** [2014 (4) ALT 104]; and, (iv) **Narani Jangaiah and others v. Pasham Anjaneyulu and others** [2015 (4) ALD 1] relied upon by the learned counsel for defendants on the aspect of bar contained in the proviso to Order VI Rule 17 have no application to the facts of the case.

13. The next contention of the defendants is that the proposed amendment, which was being sought 14 years after the commencement of the *lis*, is barred by law of limitation, particularly Article 58 of the Indian Limitation Act, which postulates that for a suit for declaration, the limitation is three years. In support of the said contention, reliance is placed upon the decision in **Khatri Hotels Private Limited & another v. Union of India & another**

[(2011) 9 SCC 126]. In the case on hand, by way of proposed amendment, the 2nd plaintiff is seeking declaration of title; besides that relief, the relief of confirmation of possession in the form of perpetual injunction was already sought; and the 2nd plaintiff is further seeking alternative relief of recovery of possession; therefore, the suit is not one for bare declaration; and the reliefs sought contain a consequential relief; therefore, Article 58 of the Indian Limitation Act, which deals with bare declaration, has no application *prima facie*; moreover, this aspect of bar of limitation has to be decided by the trial Court after fullfledged trial as the said issue being a mixed question of fact and law involves adjudication on merits after appreciation of evidence brought on record. However, the decision of the Supreme Court in **L.C.Hanumanthappa (since died) rep. By his LRs. v. H.B.Shivakumar** [2015 (6) ALD 14 (SC)] was relied upon in support of the contention that an amendment barred by law of limitation cannot be allowed. The facts of the cited case show that a suit for perpetual injunction was sought to be converted into a suit for declaration of title and recovery of possession by way of an amendment. The right to sue for declaration of title first arose on 16.05.1990 on the facts which are undisputed in that case and the amendment was sought 11 years thereafter; and; therefore, the Supreme Court found on facts that by 16.05.1993, the suit based on declaration of title having been time barred, the doctrine of relation back would not apply to the facts of that case; hence, the Supreme Court confirmed the orders of the trial Court and the High Court rejecting the application for amendment. In the case on hand, the factual aspect as to whether the 2nd plaintiff's claim that the 2nd plaintiff is in possession of the plaint 'A' schedule property is yet to be decided on

merits and it is not an undisputed or an admitted fact. The said aspect has to be decided by the trial Court as per the directions in the revisional orders of this Court, by appreciating the evidence at an appropriate stage while determining the issues settled for determination in the suit. Therefore, in view of the peculiar facts of the case on hand, it cannot, at this stage, be said that the relief being sought to be claimed in the suit by way of proposed amendment is barred by law of limitation as the said question being a mixed question of fact and law, requires determination by the trial Court after fullfledged trial. The view of this Court finds support from the decision in **Raghu Thilak D. John v. Rayappan and others**: [AIR 2001 SC 699] wherein it was held that amendment of pleadings shall be allowed to avoid uncalled for multiplicity of litigation and that the dominant purpose of allowing amendment is to minimize litigation and the plea of limitation could be made a subject matter of the issue after allowing the amendment prayed for. Further, as per settled law, the merits of the proposed amendment cannot be gone into while considering an application filed for seeking amendment. Viewed thus, this Court finds that the ratio in the decision of the Supreme Court referred to supra cannot be applied to the facts of the present case. Thus, this Court is of the considered opinion that there are no legal impediments for allowing the amendment. In the discussion supra, this Court has already held that on facts, the amendment sought is *bonafide* and is permissible in the facts peculiar to the case. Further, any amendment which is necessary for effective adjudication of the *lis* and giving a quietus to the dispute between the parties, once and for all, can be permitted.

14. On the above analysis, this Court finds that the orders of the trial Court in both the revisions brook interference.

15. Accordingly, both the revisions are allowed and the orders impugned in these revisions are set aside and as a sequel, I.A.Nos.45 of 2016 and 46 of 2016 are allowed. The trial Court shall permit the 2nd plaintiff to amend the plaint and file an amended neat copy of the plaint and permit the defendants to file additional written statement in answer to the amended pleadings in the plaint; and; if necessary, settle additional issues and dispose of the suit in strict accordance with the procedure established by law. The plaintiff shall carryout the amendment permitted by this Court within three weeks from the date of receipt of a copy of this order; thereafter, within further time of three weeks time, the defendants shall file their additional written statement, if any, in answer to the amended portion of the plaint; the trial Court shall dispose of the suit as directed in this order, as expeditiously as possible, preferably, within three months time from the date of filing of the additional written statement by the defendants, subject, however, to the co-operation of both the sides.

No order as to costs.

Pending miscellaneous petitions, if any, shall stand closed.

M. SEETHARAMA MURTI, J

28th December 2016

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