

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No. 5064 OF 2015

ORDER:

This revision is filed, under Article 227 of the Constitution of India, challenging the order dated 29.09.2015 passed by the Principal Junior Civil Judge, Nizamabad, in I.A.No.634 of 2015 in O.S.No.406 of 2007, whereby the request of the petitioner to amend the written statement deleting few lines in para No.2 and substitute by adding para Nos.2 to 5 of the petition, was rejected.

2. The specific case of the petitioner/4th defendant before the trial Court was that the 1st respondent/plaintiff filed the suit against his father (1st defendant) and the 2nd respondent herein/2nd defendant. The 1st respondent filed his written statement and thereafter died during pendency of the suit. Consequently, the petitioner and three others were impleaded as defendants 3 to 5 being the legal heirs of the deceased 1st defendant. As the petitioner did not file written statement or additional written statement after impleadment, he was set ex parte. Thereupon, he filed a petition in I.A.No.883 of 2014 to set aside the ex parte order which was dismissed, but it was carried in a revision to this Court and the same was allowed. Therefore, he could not have filed his separate written statement in view of the observations made in the order dated 17.07.2015 in C.R.P.No.2727 of 2015.

3. It is specifically contended that originally the Nizamabad District Co-operative Marketing Society Limited purchased an extent of 100 ft. x 60 ft. from one Bomadevi Balaiah under a registered sale deed bearing document No.1309 of 1963 and the Indur District Co-operative Marketing Society, in turn, sold the same to the 1st defendant under a registered sale deed bearing document No.4700 of 2004 dated

04.06.2004. Since then, the 1st defendant (deceased) was in exclusive possession of the same till his death. Subsequent to the death of the 1st defendant, the property being his Matruka property, the same was partitioned and in the said partition, the schedule property fell to the share of the petitioner and in evidence of the same, his mother, brothers and sisters have relinquished their rights in his favour by a registered release deed bearing document No.1746 of 2013 dated 14.03.2013. Thus, the petitioner became absolute owner of the suit schedule property.

4. The alleged partition took place subsequent to the death of the 1st defendant. The said fact could not be brought to the notice of the Court. Therefore, the petitioner intends to amend the written statement as mentioned in the petition.

5. The 1st respondent denied the allegation made in the petition that the petitioner cannot be permitted to amend the written statement on any of the grounds mentioned in the affidavit, since trial has already been commenced and two witnesses were examined in chief and their cross-examination was postponed at the request of the petitioner. Therefore, the proposed amendment of the written statement cannot be permitted and prayed for dismissal of the petition.

6. Upon hearing argument of both the counsel, the trial Court dismissed the petition on the ground that the petitioner did not exercise the due diligence and that after commencement of trial, amendment cannot be allowed in view of the proviso to Order VI Rule 17 of CPC which came into force in the year 2002 by virtue of the Act 22 of 2002.

7. Aggrieved by the order of the trial Court, the present revision is preferred raising several contentions that the order of the trial Court is against the proviso to Order VI Rule 17 of CPC and that it is settled law that amendment can be allowed even after commencement of trial, as

the dispute is required to be decided between the parties finally, as laid down by the Apex Court in ***Baldev Singh and others Vs. Manohar Singh (reported in 2006(5) ALT 52 (SC) and Usha Balashaheb Swami and others Vs. Kiran Appaso Swami and others*** and of this Court in ***T.Munilakshmi and another Vs. A. Rajendra Reddy (reported in 2015(5) ALT 274)*** and on the strength of the principles laid down in the above judgments, the counsel for the petitioner sought permission to amend the written statement as prayed for.

8. At the stage of admission, I heard both the counsel at length. The counsel for the petitioner mainly contended that the incident of partition and execution of release deed or deeds took place subsequent to the death of the 1st defendant. Therefore, the subsequent events have to be brought on record to decide real dispute in controversy, and apart from that, though the trial is commenced, amendment can be permitted if the petitioner is able to prove exercise the due diligence as required under Order VI Rule 17 of CPC, but the trial Court did not consider the same in proper perspective and committed an error in dismissing the petition and finally prayed to allow the revision petition.

9. Whereas, the counsel for the 1st respondent/plaintiff opposed the revision petition on the ground that the powers of the Court under Article 227 of the Constitution of India are limited and even if the impugned order is erroneous, it cannot be set aside unless the Court finds that it did not exercise its power which vested on it or exercised discretion exceeding its power, and apart from that, as the trial was already commenced and two witnesses were examined as P.Ws.1 and 2 in chief, the amendment cannot be allowed in view of the bar under proviso to Order VI Rule 17 of CPC and that the proposed amendment is not necessary to decide the real controversy between the parties

except to decide the inter se rights of the legal heirs of the deceased 1st defendant and prayed for dismissal of the revision petition.

10. Considering rival contentions and perusing the material available on record, the only point that arises for consideration is, ***“whether the petitioner/4th defendant be permitted to amend the written statement filed by his father, the deceased 1st defendant?”***

POINT:

11. As seen from the facts of the case, the suit was initially filed against the father of the petitioner, the 1st defendant in the main suit. The 1st defendant filed his written statement on 30.06.2008 and died in the year 2013. Later the petitioner and defendants 3 and 5 were brought on record being the legal heirs of the deceased 1st defendant. But the petitioner remained ex parte. Later he filed an application to set aside the ex parte order and the same was dismissed. The matter was carried in revision, before this Court in C.R.P.No.2727 of 2015. By an order dated 17.07.2015, the said revision was allowed permitting the petitioner to adopt the written statement filed by the 1st defendant even without filing a memo to adopt the written statement. Since the petitioner being the legal heir, he cannot set up a new or individual right and also he cannot take up a new and inconsistent plea contrary to the one taken up by the deceased 1st defendant and the proposed legal representatives stand in the shoes of the deceased defendant and must accept their position adopted by their predecessor, by following the principle laid down in ***Gajraj Vs. Sudha and others.***

12. While the matters stood thus, after setting aside the ex parte order, the petitioner filed the present petition for amendment of the written statement on the ground that he became absolute owner of the

property in view of release deed executed by his mother, brothers and sisters, after partition of the property to circumvent the order passed by this Court. No doubt, the petitioner is entitled to bring to the notice of the trial Court, the subsequent events that took place after the death of his father the 1st defendant and it is only by way of subsequent pleading under Order VIII Rule 9 of CPC. But instead of filing an additional pleading filed amendment petition narrating the subsequent events that took place subsequent to the death of the 1st defendant, sought permission under Order VI Rule 17 of CPC to amend the written statement withdrawing the specific admission made by the original 1st defendant (deceased) in para 2 of the written statement and to substitute the subsequent events. If the petitioner wants to bring the subsequent events to the notice of the Court, the procedure to be followed by him is under Order VIII Rule 9 of CPC and not under Order VI Rule 17 of CPC seeking permission to amend the written statement, since partition and execution of release deed by his mother, sisters and brothers are the subsequent events.

13. In its recent judgment in ***Ram Niranjana Kajaria Vs. Sheo Prakash Kajaria and others***^[1], the Apex Court, while dealing with a petition filed under Order VI Rule 17 of CPC, held that when an admission is made in the written statement, the same cannot be permitted to be withdrawn by way of amendment and alternative pleas cannot be mutually destructive of each other. In the present case, the petitioner wanted to withdraw the admission made by the original 1st defendant in para 2 wherein he contended that the plaint schedule land is the absolute property of the 1st defendant. The proposed amendment though not change the original stand of the 1st defendant, the subsequent event cannot be brought to the record by amending the original written statement under Order VI Rule 17 of CPC.

14. The trial Court dismissed the petition filed under Order VI Rule 17 of CPC on two grounds. The first ground is that after commencement of trial, amendment by pleadings cannot be permitted in view of the interdict contained under the proviso to Order VI Rule 17 of CPC and the second ground is that the petitioner failed to explain the reason for his failure to file a petition under Order VI Rule 17 of CPC, exercising due diligence.

15. The proviso to Order VI Rule 17 of CPC disables the petitioner to claim relief in the present petition more particularly to amend the pleadings. According to Order VI Rule 17 of CPC, 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. However, the principles to allow amendment petitions under Order VI Rule 17 of CPC are well settled; viz., that the amendment shall not alter the basic structure or nature of the claim and that the amendment shall not takeaway the valuable right that accrued to the respondent or such amendment will not takeaway the unequivocal admissions made in the pleadings. However, by amendment to Order VI Rule 17 of CPC an interdict is created to allow such amendments 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. Allowing amendments prior to commencement of trial is a matter of routine.

16. The petitioner, who seeks permission to amend the written statement or pleadings after commencement of trial, has to establish that despite exercise of due diligence, he could not raise such plea. In the present case, the reason assigned by the petitioner is that he remained ex parte after his impleadment in the main suit. But, the

same was set aside in C.R.P.No.2727 of 2015 and that the present petition was filed subsequent to the death of the original 1st defendant (deceased). No doubt, the petitioner has to explain the reason for his failure to get the written statement amended immediately after he came on record, despite exercise of due diligence. But the entire affidavit is silent except explaining as to filing of a petition to set aside the ex parte order, carrying the matter to a revision and allowing the same by this Court. In **Rameshkumar Agarwal Vs. Rajmala Exports Private Limited and others**^[2], the Apex Court, relying on **Revajeetu Builders and Developers Vs. Narayanaswamy & Sons and others**^[3] to decide the scope of proviso to Order VI Rule 17 of CPC., held in para Nos. 10 and 11 as follows:

"On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the 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. These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are illustrative and not exhaustive.*

It is clear that while deciding the application for amendment

ordinarily the Court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations."

The Apex Court further held that amendment application to be filed immediately after filing suit *i.e.* before commencement of trial. If the petitioners are able to prove or explain as to how they failed to take steps before the trial Court despite exercising due diligence, the Court can allow such amendment. The *factum* of exercising due diligence depends upon circumstances.

17. In ***Rajesh Kumar Aggarwal and others Vs. K.K.Modi and others*** ^[4] the Apex Court held that:

"The object of Order 6 Rule 17 is that the Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. 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. The Court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. The amendment to pleading should be liberally allowed since procedural obstacles ought not to impede the dispensation of justice. The Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard the rights of both parties and to subserve the

ends of justice."

It is further held that 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.

18. In ***Bairam Susheela Vs. Pendota Rama Rajaiah*** (6th supra), the Apex Court held that mere grant of permission to amend the pleadings does not confer or take away the rights of the parties. On the basis of the amendment, necessary issues have to be framed after giving an opportunity to the other party and evidence has to be adduced on the issues so framed, if necessary. It shall always be open to the parties to raise such pleas as are open to them touching on the relief introduced through amendment."

19. In ***A.Krishna Rao Vs. A.Narahari Rao and others*** ^[5] (5th supra), this Court, while dealing with an application under Order VI Rule 17 of C.P.C., held that:

"Rejection of petition under Order VI Rule 17 of C.P.C. on the ground that proposed amendment is inconsistent with original plea and petitioner cannot be permitted to raise such inconsistent plea is not justified. Amendment of pleading cannot be rejected even if proposed amendment has effect of raising conflict in plea. It is for the plaintiff to justify his pleadings and prove the same with reference to evidence. Since the procedure being handmaid of justice, a party cannot be deprived of his right to raise pleadings by way of amendment unless proposed amendment results in failure of justice."

20. In view of the principles laid down in the above judgments, the

Courts have to allow amendments if petitions under Order VI Rule 17 of CPC are filed before commencement of trial. If petitions are filed after commencement of trial, the petitioners have to show that amendment petition could not be filed in spite of exercise of due diligence. Here, the petitioner explained the reason for his failure to amend the plaint, more particularly based on the subsequent events that took place after the death of the original 1st defendant i.e., partition and execution of release deed by his mother, sisters and brothers. However, it is clear from the material on record that the incident of partition of the property and execution of release deed by the mother, sisters and brothers of the petitioner is a subsequent event after the death of the original 1st defendant. Such fact can be brought on record by following the procedure under Order VIII Rule 9 of CPC but not under Order VI Rule 17 of CPC. The reasoning recorded by trial Court that the petitioner did not explain the due diligence he exercised in taking steps to amend the written statement appears to be correct, but dismissal of petition on the ground that it is filed after commencement of trial is not sufficient cause, both exercise of diligence and commencement of trial are interlinked. Amendment can be allowed after commencement of trial only when the petitioner is able to establish that he exercised due diligence, despite it he could not take steps to get the written statement amended. However, the alleged partition etc., is a subsequent event, such event can be brought on record by following Order VIII Rule 9 of CPC but not under Order VI Rule 17 of CPC. On this ground alone, the petition is not maintainable, and at best, it is open to the petitioner to file a petition under Order VIII Rule 9 of CPC to bring the subsequent events on record after obtaining leave of the Court as required under Order VIII Rule 9 of CPC. Therefore, I find no illegality in exercise of discretion or failure to exercise discretion, which vested on the trial Court in dismissing the petition, warranting interference of this Court exercising the jurisdiction under Article 227 of the Constitution of India. Hence, I

find that the petitioner is not entitled to amend the written statement invoking Order VI Rule 17 of CPC. Accordingly, the point is held against the petitioner.

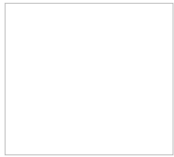
21. However, the petitioner is entitled to bring the subsequent events to the notice of the Court by following the necessary procedure contemplated under Order VIII Rule 9 of CPC subject to the entitlement as per law.

22. With the above observation, the Civil Revision Petition is dismissed at the stage of admission. There shall be no order as to costs.

Consequently, miscellaneous petitions, if any, pending in the revision petition shall also stand dismissed.

M.SATYANARAYANA MURTHY, J

19th January, 2016
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HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P.No. 5064 of 2015

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- [\[1\]](#) 2016(1) ALT 1 (SC)
[\[2\]](#) AIR 2012 SC 1887
[\[3\]](#) (2009) 10 SCC 84
[\[4\]](#) (2006) 4 SCC 385
[\[5\]](#) 2014(6) ALD 258