

HON'BLE SRI JUSTICE A.RAJASHEKER REDDY

CIVIL REVISION PETITION No.2514 OF 2016

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ORDER:

This revision petition is filed by the petitioners/respondents against the order dated 04.04.2016, passed in IA.No.88 of 2016 in OS.No.642 of 2005, wherein the Court below allowed the petition filed by the respondent/plaintiff, seeking amendment of the prayer by adding declaration of title in addition to prayer for recovery of possession.

2. Learned counsel for the petitioners/defendants submits that initially suit in OS.No.642 of 2005 was filed by the respondent/plaintiff for grant of perpetual injunction and after filing of written statement, an amendment petition is filed by the plaintiff for recovery of possession in the year 2012 and the same was allowed. There upon the petitioners/defendants filed additional written statement and the Court below examined PWs.1 to 3 and marked Exs.A1 to A17. But after completion of evidence of DW1, when the matter is posted for cross examination of DW2, IA.No.88 of 2016 is filed by the respondent/plaintiff for amendment of prayer once again for declaration of title in addition to recovery of possession. He further submits that the respondent/plaintiff has not stated the reasons for filing the aforesaid application after trial is commenced; that there is no due diligence on the part of the respondent/plaintiff and that the trial Court has not considered the said aspect though raised and argued by them.

3. On the other hand, learned counsel for the respondent/plaintiff submits that by adding prayer for declaration of title, cause of action in the suit does not change. He also submits that the trial Court also observed that all the facts for

granting relief of declaration of title are already on record, and as such, allowed the petition for amendment of declaration of title in the prayer, rightly.

4. In this case, admittedly the suit was filed for perpetual injunction and the prayer was amended for recovery of possession in the year 2012 and thereafter PWs.1 to 3 and DW1 were examined. At the stage of cross-examination of DW2 present petition is filed seeking amendment for declaration of title. No doubt, the amendment sought for, is declaration of title. But, the plaintiff has not stated the reasons as to why this application could not be filed before commencement of trial though the petitioners/defendants denied the title of the respondent/plaintiff in the written statement. Even, when the amendment petition for recovery of possession is allowed in the year 2012, prayer for declaration of title is not asked by the respondent/plaintiff. Even, the affidavit filed in support of present amendment petition also does not state that inspite of due diligence they could not file the application for amendment. The respondent/plaintiff is seeking amendment of the pleadings in piecemeal.

5. The decisions relied on by the learned counsel for the respondent/plaintiff pertain to the period prior to amendment of Code of Civil Procedure in 2002 wherein proviso to Order VI, Rule 17 is added.

6. This Court in ***Muthukur Gram Panchayat v. Kakuturu Ramesh Reddy***^[1] at paras 10 and 13 held as follows;

“10. The above provisions make it clear that:

(a) no application for amendment shall be allowed after the trial has commenced;

(b) 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.

13. Therefore, the contention of the plaintiffs is that they

came to know that they did not seek the prayer for declaration of right of easement only at the time of trial is factually incorrect and misleading. Admittedly, PW1 was specifically questioned about this aspect during cross-examination and he seems to have denied the said suggestion. That means, the stand of the plaintiffs was that a suit for permanent injunction without seeking relief of declaration is maintainable. It is also the contention of the plaintiffs that there are no laches on their part and in spite of due diligence, they could not have raised the matter earlier. This version of the plaintiffs is not convincing. Admittedly, after filing of the suit for bare injunction, the defendant filed a written statement taking a specific plea that the suit is not maintainable, without seeking relief of declaration and having gone through the written statement filed in 2008, and having come to know the above specific plea of the defendant, the plaintiffs kept quiet till April 2010. PW1 was cross-examined and therefore the plaintiffs cannot say that there are no laches on their part and in spite of due diligence they could not have raised the matter earlier. The pleadings of the parties were within their knowledge and the stand taken by the defendant in the written statement is also within the knowledge of the plaintiffs and there was utter negligence on the part of the plaintiffs in not raising the matter earlier. The lower Court seems to have committed a mistake in not considering the averments made by the defendant in the written statement and also in the counter. The question whether the plaintiffs have pleaded about the easementary rights in their plaint or not is immaterial. The important question that the lower Court ought to have considered is whether the trial commenced or not and once the trial commenced whether in spite of due diligence the plaintiffs could not have raised the matter before the commencement of the trial or not. Since the lower Court committed an irregularity, the impugned order is liable to be set aside.”

7. In ***J.Samuel and others v. Gattu Mahesh and***

others ^[2] at paras 11 and 15, it was held as follows;

“11. As stated earlier, in the present case, the amendment application itself was filed only on 24.09.2010 after the arguments were completed and the matter was posted for

judgment on 04.10.2010. On proper interpretation of proviso to Rule 17 of Order VI, the party has to satisfy the Court that he could not have discovered that ground which was pleaded by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the Court to amend the pleadings at any stage of the proceedings.

However, proviso restricts that power once the trial has commenced. Unless the Court satisfies that there is a reasonable cause for allowing the amendment normally the Court has to reject such request. An argument was advanced that since in the legal notice sent before filing of the suit, there is reference to readiness and willingness and the plaintiff has also led in evidence, nothing precluded the Court from entertaining the said application with which we are unable to accept in the light of Section 16(c) of the Specific Relief Act as well as proviso to order VI, Rule 17. The only reason stated so in the form of an affidavit is omission by "type mistake". Admittedly, it is not an omission to mention a word or an arithmetical number. The omission is with reference to specific plea which is mandated in terms of Section 16(c) of the Specific Relief Act.

15. In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the purview of a typographical error. The term typographical error is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code."

8. In view of the above, I do not see any reason as to why the trial Court has not considered the effect of amendment to proviso to Order-VI Rule 17, which was introduced by way of adding proviso 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 y 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.”

9. The trial Court has not adverted this fact while allowing the amendment petition. Even the affidavit filed in support of IA.No.88 of 2016, also does not show that inspite of due diligence the application could not be filed. The ratio laid down in the above referred Judgment squarely applies to the facts of the present case.

10. In view of the above facts and circumstances, the impugned order dated 04.04.2016, passed in IA.No.88 of 2016 in OS.No.642 of 2005, by the Court below is set aside and the IA is dismissed.

11. Accordingly, the Civil Revision Petition is allowed. No order as to costs.

As a sequel thereto, miscellaneous petitions, if any, pending, shall stand closed.

A.RAJASHEKER REDDY, J

06.06.2016

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[\[1\]](#) 2014(2) ALT 526

[\[2\]](#) Civil appeal No.561 of 2012