

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.3027 OF 2016

ORDER:

This revision is filed challenging the order passed by the Principal District Judge, Medak at Sangareddy on 31-3-2016 in I.A.No.1856 of 2014 in O.S.No.85 of 2007 whereby petition filed by the petitioner under Order VI, Rule 17 read with Section 151 C.P.C. seeking to amend the Written Statement was dismissed declining to grant leave to amend the pleading incorporating plea of estoppel on the ground that the petitioners did not establish exercise of due diligence and that as the proposed amendment would amount to raising contradictory plea and that trial is commenced as on the date of filing of the petition.

Petitioners herein are the defendants 15, 28 and 44 in the suit in O.S.No.85 of 2007. The suit was filed for declaration of title and possession and opposing suit claim. Petitioners filed written statement raising several contentions, however, petitioners could not raise plea of estoppel due to oversight and therefore, sought leave of the court to amend the written statement raising plea of estoppel.

Respondents filed counter denying material allegations while contending that the evidence of P.W.1 was commenced in the month of November, 2010 and documents were also marked and when the suit was posted for cross-examination of P.W.1, petitioners represented that the compromise talks are going on and sought time

and that when the issues have been framed, pleadings cannot be amended.

It is further contended that for the last four years, the suit is being posted for amendment of written statement which is not permissible and therefore, the petition is liable to be dismissed as prayed for.

Trial court based on a judgment of the Honourable Supreme Court reported in *AJENDRAPRASADJI N.PANDE AND ANOTHER v. SWAMI KESHAVPRAKESHDASJI AND OTHERS* ⁽¹⁾ and *THONDURI CHANGA REDDY v. CHILAKURU CHANDRA SEKHARA REDDY* ⁽²⁾ that petitioners failed to explain the reason for the delay and also failed to satisfy that petitioners that despite exercise of due diligence, they could not raise such plea before the tribunal, proposed amendment is contrary to earlier plea.

The order passed by the tribunal is challenged by the revision petitioners on various grounds mostly on the ground that petitioners could not raise such plea only due to oversight and explain the reasons for such delay and that apart, the proposed amendment would not change the cause of action by taking away valuable right that accrued to respondents but the tribunal erroneously dismissed the petition.

Before admission, notice was ordered to the respondent but personal notice could not be served and later, publication under

¹ 2007 (2) ALD 93 (SC)

² 2006 (1) ALT 175

Order 5 Rule 20 C.P.C. a notice by publication was ordered and accordingly notice was published but none could appear either in person or through any advocate.

During hearing, learned counsel for the revision petitioners reiterated the contentions raised before the court before while contending that a plea of estoppel must be raised in the written statement otherwise, he is not entitled to raise such a plea at the time of hearing and he placed reliance of judgment of apex court reported in *HIS HOLINESS DIGYA DARSHAN RAJENDRA RAM DOSS v. DEVENDRA DOSS*⁽³⁾.

He also further contended that the proposed amendment would not change nature of defence in written statement and would not take away valuable right that accrued to the respondents or it would not amount to withdraw any admission, if, made.

As seen from the allegations made in the petition, a specific plea of estoppel based on settlement deed dated 20-2-1985 executed by her original owner was pleaded in the written statement but specific plea of estoppel was not raised.

The foremost ground on which the petition was dismissed by the trial court is that the proposed amount is contrary to the earlier pleading. On a perusal of recital of written statement, the proposed amendment is not contrary to the pleas raised in the written statement and in the entire order, trial court did not point out any

³ AIR 1973 SC 268

contrary plea in the written statement already filed by petitioners but mere making allegation that it is contrary to the earlier pleas is not sufficient to dismiss the petition filed under Order VI Rule 17 read with Section 151 C.P.C. Therefore, dismissal of application on this ground is unsustainable.

The second ground for dismissal of the petition by trial court is commencement of trial. According to proviso to Order VI Rule 17, after commencement of trial amendment cannot be permitted except in certain circumstances.

After amendment of Central Act of 22 of 2002, this question came up before apex court in several judgments and in *RAMESHKUMAR AGARWAL v. RAJMALA EXPORTS PRIVATE LIMITED AND OTHERS* ⁽⁴⁾ relying on *REVAJEETU BUILDERS AND DEVELOPERS v. NARAYANASWAMY & SONS AND OTHERS* ⁽⁵⁾, the Honourable Supreme Court laid down certain guidelines which are 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;

⁴ 2012 (4) ALT 1 (SC)

⁵ 2009 (8) SCJ 401

- (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 amendment 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 is 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 is commenced despite exercising due diligence, the Court can allow such amendment. The factum of exercising due diligence depends upon circumstances.

In *RAJESH KUMAR AGGARWAL AND OTHERS v. K.K.MODI AND OTHERS*⁽⁶⁾, wherein the Apex Court held as follows:

“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

⁶ 2006 (3) ALT 50 (SC)

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 as follows:

“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.”

Necessary issues have to be framed after giving an opportunity to other party and evidence has to be adduced on the issues so framed if necessary. It shall be open to the party to raise the relief through amendment as contained in *BAIRAM SUSHEELA v. PENDOTA RAMA RAJIAH*⁽⁷⁾.

In the present case, proposed amendment is only a legal plea i.e., plea of estoppel based on the settlement deed which is already referred in the written statement. In which case, when the petitioner is able to establish that despite exercise of due diligence, he could not amend written statement, such amendment can be permitted. Even in the decision reported in

⁷ 2004 (5) ALT 233

REVAJEETU BUILDERS AND DEVELOPERS v.

NARAYANASWAMY & SONS AND OTHERS (5th cited), the apex

Court in paragraph 61 of the judgment held as follows:

“The courts have consistently laid down that for unnecessary delay and inconvenience, the opposite party must be compensated with costs. The imposition of costs in an important judicial exercise particularly when the courts deal with the cases of amendment. The costs cannot and should not be imposed arbitrarily.”

Therefore, by applying the principles laid down in the above judgment, court can permit the amendment by imposing costs in view of unnecessary delay and inconvenience in disposal of the suit.

In the present case, the plea of estoppel could not be raised due to oversight though the basis for plea of estoppel is based on settlement deed which is referred in the written statement. The word ‘due diligence’ is not defined but conduct of ordinary prudent reasonable man is to be taken into consideration while deciding whether the party exercised due diligence or not. Hence, due to oversight, such plea was not taken.

In *BHARAT PETROLEUM CORPORATION LTD., Vs. PRECIOUS FINANCE INVESTMENT Pvt.Ltd.*, (⁸) in W.P.No.2897 of 2006 (decided on 20.10.2006), Bombay High Court held at para 15, as follows:

“The Dictionary meaning of the expression “due diligence” as given in the Blacks Law Dictionary, Sixth

⁸ MANU/MH/1328/2006

Edition, 1990 means "Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Similarly the Law Lexicon by P.Ramanatha Aiyer, Second Edition (Reprint) 2001 explains "due diligence:" to mean such watchful caution and foresight as the circumstances of the particular case demands. While examining the explanation offered or cause shown as to why in spite of due diligence a party could not have raised the matter before commencement of trial, the Court may have to see the circumstances in which the party is seeking amendment. In short the explanation as to "due diligence" depends upon the particular circumstances and the relative facts of each case to reach a conclusion one way or the other."

In *CHANDER KANTA BANSAL v. RAJINDER SINGH ANAND*⁽⁹⁾,
the Apex Court held as follows:

"The entire object of the amendment to Order 6 Rule 17 as introduced in 2002, is to stall filing of application for amending a pleading subsequent to the commencement of trial, to avoid surprises and that the parties had sufficient knowledge of the other's case. It also helps in checking the delays in filing the applications. Once, the trial commences on the known pleas, it will be very difficult for any side to reconcile. In spite of the same, an exception is made in the newly inserted proviso where it is shown that in spite of due diligence, the party could not raise a plea, it is for the court to consider the same. Therefore, it is not a complete bar nor shuts out entertaining of any later application. The reason for adding proviso is to curtail delay and expedite hearing of cases.

The proviso limits the power to allow amendment after the commencement of trial but grants discretion to the court

⁹ (2008) 5 SCC 117

to allow amendment if it feels that the party could not have raised the matter before the commencement of trial in spite of due diligence. It is true that the power to allow amendment should be liberally exercised. The liberal principles which guide the exercise of discretion in allowing the amendment are that multiplicity of proceedings should be avoided, that amendments which do not totally alter the character of an action should be granted, while care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of amendment. So whether a party has acted with due diligence or not, would depend upon the facts and circumstances of each case. This would, to some extent, limit the scope of amendment to pleadings, but would still vest enough powers in courts to deal with the unforeseen situations whenever they arise."

In *J.SAMUEL AND OTHERS v. GATTU MAHESH AND OTHERS*

(¹⁰) the Apex Court held at para 19 as follows:

"Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone 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 in situations of requested amendment after the commencement of trial.

On an analysis of entire law laid down under Order VI Rule 17 C.P.C. the petitioners are able to establish that despite exercising due diligence, he could not amend written statement and the court can allow such amendment as per the decision reported in *REVAJEETU*

¹⁰ (2012) 2 SCC 300

BUILDERS AND DEVELOPERS v. NARAYANASWAMY & SONS AND OTHERS (5th cited).

Here the proposed amendment would not change the nature of defence set up in the written statement and that would not take away the valuable right accrued, if any, to the respondents and no prejudice would be caused to them and therefore, taking into consideration of all the circumstances by applying the principles laid down by Apex court in the above judgments, I am of the considered view that dismissal of petition filed under Order VI Rule 17 C.P.C. by the trial court is erroneous and accordingly order impugned passed by the trial court is hereby set aside and consequently, petition filed under Order VI and Rule 17 read with Section 151 C.P.C. in I.A.No.1856 of 2014 in O.S.No.85 of 2007 is allowed.

Accordingly, this Civil Revision Petition is allowed. No costs.

As a sequel to the disposal of this revision, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE M.SATYANARAYANA MURTHY

Dated 14-10-2016.

Dvs.

HONOURABLE SRI JUSTICE M.SATYANARAYANA MURTHY



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Dated 14-10-2016.

Dvs