

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

CIVIL REVISION PETITION No.2759 of 2016

ORDER:

This Civil Revision Petition is preferred against order dated 11.04.2016 passed in I.A.No.893 of 2015 in O.S.No.36 of 2010 on the file of IV Additional District Judge, Kadapa.

2. Revision petitioner herein is 1st defendant and respondents 1 to 3 herein are plaintiffs in the above referred suit. Parties will be hereinafter referred to as 'plaintiffs' and 'defendants', as arrayed in the suit, for better understanding.

3. Plaintiffs filed I.A.No.893 of 2015 seeking amendment of plaint and that petition was initially allowed. Questioning the same, 1st defendant preferred revision and this Court, by order dated 16.11.2015 in CRP No.3838 of 2015, remitted back the matter to Court below directing the trial Judge to hear the application afresh and pass orders on merits, as per the observations made in that order. After remand, trial Judge passed the impugned order. Challenging the same, 1st defendant preferred the present revision.

4. Heard both sides.

5. Advocate for revision petitioner/1st defendant submitted that suit is filed in the year 2008 and amendment petition was filed after commencement of trial and as per the proviso to Order VI Rule 17 of Code of Civil Procedure, 1908, ('the Code', for brevity) unless due diligence is shown, any amendment, after commencement of trial, is not permissible and this Court, while remitting the matter, directed the trial Judge to examine this aspect, but the trial Court has not at all dealt with that matter and decided the application, ignoring the fact that plaintiffs

have not pleaded any diligence in the affidavit filed in support of amendment petition.

6. On the other hand, advocate for respondents/plaintiffs submitted that the Court below has decided the matter as per observation of this Court and answered them in paragraphs 9 to 11 of impugned order. He further submitted that since the extent in respect of 'B' schedule is wrongly typed and as it may lead to unnecessary complications and multiplicity of proceedings at the time of execution, plaintiff filed amendment petition and the Court below rightly permitted amendment and objection of 1st defendant is not at all tenable.

7. According to plaintiffs, extent of 'B' schedule is 15 cents, but it is wrongly typed as 10 cents and all boundaries for this 'B' schedule are correctly mentioned. So also in 'D' schedule, there is wrong mention of extent. This Court, while remitting the matter to Court below, observed as follows:-

“It is unknown how that proposition is applicable to the case on hand, even as from the order, at para No.7 last but 4th line speaks the factum of the suit originally filed in the year 2008 was numbered as O.S.No.57 of 2008 and later renumbered as O.S.No.36 of 2010. To say the suit is subsequent to the amendment. The learned judge should have observed that it has no application, but wrongly relied on a different foot.”

8. This observation was made with reference to judgment relied on by trial Court with regard to application of proviso to Order VI Rule 17 of the Code. Here, as seen from record, there cannot be any ambiguity with regard to application of proviso to Order VI Rule 17 of the code, since suit is filed in the year 2008 and amendment to Order VI came into force from 01.07.2002. As per the proviso to Order VI Rule 17 of the Code, no application for amendment shall be allowed after trial is commenced, unless the Court comes to a conclusion that in spite of due diligence, the party could not have raised this matter before commencement of trial.

9. In affidavit filed in support of the amendment petition, only ground urged for seeking amendment is that amendment will not change the nature of suit as well as the cause of action and it will avoid multiplicity of proceedings and that no prejudice will be caused to respondents. It is further stated in the affidavit that mistakes were crept in his previous advocate's office due to oversight and that mistake was brought to the notice of deponent during his cross-examination.

10. It is well known principle that any fact elicited during cross examination cannot be permitted to fill it up by way of amendment at a subsequent stage. The fact that deponent was cross-examined with reference to the extents that were referred in the plaint schedule is not in dispute. So also, it is clear that a specific plea with regard to extent of 'B' schedule property was taken in the written statement. But in spite of that, the fact remains that no steps were taken till completion of evidence of P.W.1.

11. Advocate for plaintiffs submitted that amendment can be allowed even after commencement of trial and for that proposition, he relied on the judgment of this Court in ***Pattan Babu Khan Vs. Thummala Seshi Reddy***^[1]. Even as per the proviso to Order VI Rule 17 of the Code, it is not a complete bar to permit amendment after commencement of trial. But only in exceptional cases where the Court is satisfied that in spite of due diligence such a plea could not be taken by a party prior to commencement of trial, such amendment can be permitted. Here, as seen from the material, no reasons are given in the affidavit filed in support of application filed for amendment showing any due diligence.

12. Hon'ble Supreme Court, in ***J.Samuel and others Vs. Gattu Mahesh and others***^[2], has interpreted the meaning and significance of due diligence and the test to determine such meaning in exercising discretion to allow amendment. Hon'ble Supreme Court observed as follows:-

The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their pleadings. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states 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.

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.

A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit.

In the given facts, there is a clear lack of 'due diligence' and the mistake committed certainly does not come within the preview 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.

The claim of typographical error/mistake is baseless and cannot be accepted. In fact, had the person who prepared the plaint, signed and verified the plaint showed some attention, this omission could have been noticed and rectified there itself. In such circumstances, it cannot be construed that due diligence

was adhered to and in any event, omission of mandatory requirement running into 3 to 4 sentences cannot be a typographical error as claimed by the plaintiffs. All these aspects have been rightly considered and concluded by the trial court and the High Court has committed an error in accepting the explanation that it was a typographical error to mention and it was an accidental slip.”

13. From a reading of above decision, it is clear that mere typographical errors and mistakes cannot be permitted to amend the plaint which was prepared, verified and signed by the party, unless some material is shown that due diligence was adhered to by the parties and in spite of that, they could not bring the amendment prior to commencement of the trial.

14. Here in our case, after eliciting facts in the cross-examination of plaintiff with reference to plea that was taken in the written statement in respect of extent of property, plaintiff came with the application of amendment contending that mistake was crept in his advocate's office. This cannot be accepted unless it is shown with convincing material that mistake was really crept as alleged.

15. Considering these aspects and the fact that trial Judge has not given any finding as to the compliance of proviso under Order VI rule 17 of the Code to the case on hand in spite of observation by this Court while remitting the matter, I am of the view that the impugned order dated 11.04.2016 cannot be sustained and it is *contrary* to proviso of Order VI Rule 17 of the Code.

16. For these reasons, the Civil Revision Petition is allowed and the impugned dated 11.04.2016 passed in I.A.No.893 of 2015 in O.S.No.36 of 2010 by IV Additional District Judge, Kadapa, is set aside. Consequently, I.A.No.893 of 2015 in O.S.No.36 of 2010 on the file of IV Additional District Judge, Kadapa, stands dismissed.

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

closed.

S. RAVI KUMAR, J

01ST August, 2016.
Bvv

[1] 2015 (2) ALT 697

[2] (2012) 2 SCC 300