

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.3333 of 2015

ORDER:

This Civil Revision Petition, under Article 227 of Constitution of India, is directed against the order dated 30.07.2015 of learned Additional Senior Civil Judge (Judge, Fast Track Court) of Gudivada, passed in IA no.61 of 2013 in OS. no.38 of 2008 filed under Order VI Rule 17 of the Code of Civil Procedure, 1908 (for short 'the Code') requesting to permit the plaintiff to amend the plaint to include the alternative reliefs as stated in the petition list.

2. I have heard the submissions of the learned counsel for the revision petitioner/plaintiff ('the plaintiff', for brevity) and the learned counsel for the respondent/Defendant ('the defendant' for brevity). I have perused the material record.

3. The facts necessary for consideration, in brief, are as follows:

The plaintiff brought the suit against the defendant for perpetual injunction and declaration of title in respect of three items of the suit schedule property and for costs. The defendant is resisting the suit. Though the suit was originally filed in respect of items nos.1 and 2 of the plaint schedule property, the plaintiff by way of amendment of the plaint, which was earlier permitted, is now seeking the reliefs in respect of item no.3 of the plaint schedule property also. After such an amendment of the plaint was permitted, the defendant had filed an additional written statement. When the trial of the suit is in progress, the plaintiff had filed the aforementioned interlocutory application seeking amendment of the plaint to introduce the two reliefs as stated infra:

"1. To add the relief as 'C' after relief of 'b' in the prayer portion of the plaint that alternatively to partition item Nos.2 and 3 of plaint schedule properties into two equal shares and to allot one such share to the plaintiff with good and bad qualities by mets and bounds.

2. To add the relief as 'd' after the relief of 'c' that to grant future mesne profits to the plaintiff from the date of suit till the date of delivery of her share of her property relating to item nos.2 and 3 of plaint schedule property on a separate application to be filed by the plaintiff for appointment of Advocate Commissioner for ascertainment of future mesne profits after granting preliminary decree."

[Reproduced verbatim].

4. The case of the plaintiff in support of her request for amendment of the plaint as stated above and the submissions made on her behalf are as follows: 'She had brought the suit against the defendant stating that late G.Venkata Ratnam is her husband and that they had no issues and that the defendant is in no way related to her late husband. However, as he is interfering with her properties, which are the plaint

schedule properties, she is constrained to file this suit. The defendant, who is resisting the present suit, had also filed an independent suit in OS.no.157 of 2005 against the plaintiff herein to declare him as the absolute owner of the item nos.1 and 2 of the plaintiff schedule properties therein. The item no.2 of the plaintiff schedule property in the said suit corresponds to item no.3 of the plaintiff schedule property in the instant suit. In that suit he had sought the relief of declaration of title in respect of item no.2 of the plaintiff schedule property and also the relief of recovery of possession in respect of item no.1 of the plaintiff schedule property therein. Both the suits are already consolidated as per the orders of the Court. Since the defendant is making a claim in respect of items nos.2 and 3 of the plaintiff schedule properties in the instant suit on the ground that he is the son of late G. Venkata Ratnam, the husband of plaintiff, through his mother G. Sarojini and as his claim is also based on a Will said to have been executed by late G.Venkata Ratnam in favour of said G. Sarojini, the plaintiff had sought the amendment of the plaintiff by filing the present application, as it has become necessary to seek amendment of the plaintiff, in the facts and circumstances. The said Sarojini is not the legally wedded wife of the plaintiff's late husband Venkata Ratnam. Neither the defendant nor his sisters were born through her husband; and her husband has not fathered them. In view of the defence taken by the defendant in the instant suit and also the stand taken by him in his above said suit she is now constrained to seek the amendment of the plaintiff to enable her to claim alternatively, the relief of partition of items nos.2 and 3 of the plaintiff schedule properties and for allotment of one such separated share and award of mesne profits to her, in case the trial Court comes to a conclusion that she is not entitled to an exclusive right in respect of the said properties and also the relief of declaration of title. She was not properly advised by her advocate, who was formerly engaged by her and who is now no more and hence the necessity for seeking amendment of the plaintiff had arisen.'

5. In the counter, the defendant while denying the contentions of the plaintiff had *inter alia* contended as under: 'The suit is originally filed for declaration of title. After the suit was filed, she had, at an earlier point of time, sought for the amendment of the plaintiff to introduce into the plaintiff schedule one more item of property. Therefore, her former advocate knows pretty well the facts of her case. Otherwise he would not have earlier advised her to seek the amendment of the plaintiff to introduce into the plaintiff schedule one more item of property. Hence, the contention that her former advocate, since died, did not properly advise her is false. The present petition for amendment, if allowed, changes the cause of action and also alters the nature of the suit; in view of the proviso appended to Order VI Rule 17 of the Code and as the suit is coming for adducing the evidence on the side of the defendant, the plaintiff is debarred from seeking the present

amendment. The plaintiff is very well aware of the relationship of the defendant with her husband and the fact that he is also having sisters. The present relief being sought for by the plaintiff by way of the proposed amendment is the relief of partition; the said relief cannot be permitted to be claimed without impleading the defendant's sisters as parties to the instant suit. The plaintiff, in the absence of showing that she could not seek the proposed amendment despite the exercise of due diligence, is not entitled to seek amendment after the trial had commenced. Therefore, the petition is liable for dismissal.'

6. On merits, the trial Court had dismissed the petition *inter alia* holding that in view of the proviso to Order VI Rule 17 of the Code and the settled legal position the amendment sought for cannot be permitted after once the trial has commenced. The trial Court had also observed in the order impugned that from the contents of the written statement of the defendant, the plaintiff was made aware of the defence of the defendant that he is related to G.Venkata Ratnam- her husband, but she did not take steps for the amendment of the plaint at the earliest point of time; and that, therefore, the petition for amendment cannot be allowed as she had failed to establish that she could not seek the amendment despite exercise of due diligence; and that the proposed amendment, which is being sought for after eight years after the institution of the suit, is impermissible and is liable to be rejected.

7. Therefore, the aggrieved plaintiff is before this Court.

8. The learned counsel for the plaintiff would contend as follows: 'In view of the circumstances stated by the defendant in his written statement, the independent suit that was already filed by him and the further fact that the plaintiff, who is an illiterate woman, was not properly advised by her former counsel, who is no more, and also the fact that the plaintiff was being assisted by her brother Ambedkar, in prosecuting the suit and that he had alone given instructions to her former counsel, the Court below ought to have allowed the amendment as sought for by the plaintiff. The Court below ought to have seen that on coming to know of the mistake committed by the former counsel, she was advised by her present counsel to seek the alternative and other allied reliefs by way of the proposed amendment and that therefore, she had filed the instant petition for amendment of the plaint only to seek the alternate reliefs. The Court below ought to have seen that by means of the proposed amendment, the plaintiff is not changing her pleadings and her original stand and that the proposed amendment does not change the nature of the suit as she is only claiming an alternative relief of partition and other allied reliefs like mesne profits in so far as items nos.2 and 3 of the plaint schedule properties, for abundant caution and to protect her interests in case, the Court

below comes to a conclusion after full fledged trial that the defendant is related to her late husband G.Venkata Ratnam. In the facts and circumstances pleaded by the plaintiff, the Court below ought to have seen that the plaintiff is only claiming an alternative relief of partition without changing her pleadings and without introducing a new cause of action and that the said amendment is necessary for effectively and conclusively determining the dispute between the parties. Further, since the amendment is necessary for determining the real question in the controversy and prevents multiplicity of litigation, the trial Court ought to have allowed amendment. On the basis of the same cause of action, the plaintiff is entitled to bring a fresh suit. The intendment of the Rule in regard to the amendments of the pleadings is to avoid multiplicity of proceedings. Therefore, instead of driving the plaintiff to file a fresh suit for partition, it is just and fair to allow her to amend the plaint and resolve the entire controversy in respect of plaint schedule properties in the instant suit itself as such a course meets the ends of justice.'

9. Per contra, the learned counsel for the defendant while supporting the order of the Court below, has forcefully contended as under: 'In view of the proviso to Order VI Rule 17 of the Code, the plaintiff is debarred from seeking the proposed amendment, once the trial has commenced. She was already permitted to amend her plaint once earlier. She was aware of the defence and also the case of the defendant in his suit. The amendment that is being sought for after eight years after the institution of the suit, that too, for the relief of partition, without impleading the sisters of the defendant, is impermissible. Therefore, the Court below is justified in rejecting the application of the plaintiff filed for amendment of the plaint. The said order needs no interference by this Court.'

10. I have given earnest consideration to the facts and the submissions. In view of the legal contentions raised, this Court is of the considered view that it is profitable to first refer to the legal position obtaining.

10.1 In **J.Samuel and others v. Gattu Mahesh and others**^[1] the Supreme Court while dealing with an application for amendment had held as follows:

"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."

In **Rajkumar Gurawara (dead) through L.Rs v. S.Sarwagi and Company Private**

Limited and Another^[2] the Supreme Court having referred to Order VI Rule 17 of the Code had held as follows:

“Further, it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition filed during the course of the arguments, he prayed for recovery of possession and damages from the second defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation.”

It is necessary to refer to 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 inspite of due diligence, the party could not have raised the matter before the commencement of trial.”

In the decision in **VIDYABAI V/s. PADMALATHA**^[3] the Supreme Court observed that proviso to Order VI Rule 17 of the Code is couched in a mandatory form and, therefore, the court’s jurisdiction to allow an application for amendment is taken away there under unless the conditions precedent therefor are satisfied, and that before allowing amendment, the Court must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial and that it is the primary duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties and only if such a condition is fulfilled, the amendment is to be allowed. Thus, the proviso appended to Order VI Rule 17 of the Code was held to restrict the power of the Court and that it placed an embargo on exercise of its jurisdiction and that unless the jurisdictional fact as envisaged therein is found to exist, the court would have no jurisdiction at all to allow the amendment.

In **REVAJEETU BUILDERS V/s NARAYANA SWAMY**^[4], on an analysis of English and Indian case law, the Supreme Court carved out the following principles which should weigh with the Court while dealing with an 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.

The Supreme Court, however, clarified that the above principles were illustrative and not exhaustive.

In **CHANDER KANTA BANSAL V/s. RAJINDER SINGH**^[5], the Supreme Court, taking note of the fact that 'due diligence' has not been defined in the Code, referred to the dictionary meaning of 'diligence' which is to the effect that it means careful and persistent application or effort or a continual effort to accomplish something; care; caution; the attention and care required from a person in a given situation, and observed that 'due diligence' means the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. Reference was also made to 'Words and Phrases' by Drain-Dyspnea (Permanent Edition 13-A) wherein 'due diligence' was defined in law to mean doing everything reasonable and not everything possible. The Hon'ble Supreme Court, therefore, concluded that 'due diligence' would mean reasonable diligence and would mean such diligence as a prudent man would exercise in the conduct of his own affairs.

Further, in the decision in **Abdul Rehman and Another v. Mohd. Ruldu and Others**^[6], the Supreme Court, having taken note of the above provision of law had laid down that it is clear that the parties to the suit are permitted to bring forward amendment of the pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them and that the Courts have to be liberal in accepting the same, if such application for amendment is made prior to the commencement of the trial and that if such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that, inspite of due diligence, the party could not have raised the matter before the commencement of the trial. In the above decision the Supreme Court reiterated the following proposition:

"All amendments which are necessary for the purpose of determining real questions of controversy between the parties should be allowed if it does not change the basic nature of the suit. A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties."

In the above decision the Hon'ble Supreme Court further referred to the ratio in the decision in **Pankaja and another v. Yellappa**^[7], which runs as follows:

"If the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed."

In **Pankaja and another v. Yellappa (D) by LRs and others** (supra) the facts are as under: "As per the case of the plaintiffs, the defendant, in violation of the Court order, had further encroached into the suit property. Therefore, the plaintiffs sought for the amendment of the plaint for seeking the reliefs of declaration of ownership and possession of the said encroached area also. The said application was allowed by the trial Court. However, the Principal Civil Judge rejected the application for amendment on the ground that the application for amendment was filed at a belated stage. The

High Court dismissed the revision on the said ground and also on the ground that the amendment introduces a different relief than what was originally asked for. The Supreme Court permitted the amendment by allowing the appeals.

In **Sampath Kumar v. Ayyakannu and another**^[8] the facts and ratio are as under: "A suit was brought in the year 1988 for perpetual injunction in respect of an agricultural land. Before the commencement of the trial in the year 1999, the plaintiff moved the application for amendment of the plaint alleging that during the pendency of the suit, the defendant had forcibly disposed the plaintiff in the year 1989. On such averments the plaintiff sought for the relief of declaration of title to the suit property and consequential relief of recovery of possession. The defendant opposed the application of the plaintiff stating that he had perfected title to the property by adverse possession and that the suit is barred by law of limitation and that a valuable right that had accrued to the defendant is being sought to be taken away by proposed the amendment. The trial Court rejected the application for amendment observing that the appropriate course for the plaintiff was to bring a new suit. The High Court maintained the said order. The Supreme Court while allowing the appeal of the plaintiff had referred to its earlier decisions and had finally held as follows:

8. *Rukhmabai v. Lala Laxminaraya and Ors.*: [1960]2SCR253, this Court has taken the view that where a suit was filed without seeking an appropriate relief, it is a well settled rule of practice not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.

9. Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amendment. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observations in *Siddalingamma and Anr. v. Mamtha Shenoy*: AIR 2001 SC 2896).

11. In the present case the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to

avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

11. Reverting to the instant case, what is to be noted is that the plaintiff who is aged 69 years and who is stated to be an illiterate woman had first brought the suit for perpetual injunction and declaration of title in respect of plaint schedule properties denying the relationship of the defendant with her husband-G.Venkata Ratnam. However, in view of the defence and also the stand that he has taken in his suit that he is the son of the late husband of the plaintiff through one Sarojini, she is, by way of amendment, seeking the alternative relief of partition, in respect of item nos.2 and 3 of the plaint schedule properties to enable her to claim a share along with the defendant in the said properties, in case, the trial Court does not accept her case and comes to a conclusion that the defendant is related to her late husband G.Venkata Ratnam. Even as per the precedential guidance of the Supreme Court, an amendment can be permitted, if it is intended to determine the real question in controversy; and, all amendments, which are necessary for the purpose of determining real questions of controversy between the parties, should be allowed, if such amendments sought for do not change the basic nature of the suit. It is also pertinent to note that the plaintiff in this suit is not precluded from bringing a fresh suit for partition. As per the precedential guidance referred to supra, a change in the nature of relief claimed shall not be considered as a change in the nature of suit. The power of amendment should be exercised in the larger interests of doing full and complete justice between the parties and that all amendments, which are necessary for the purpose of determining the real question in controversy, should be allowed. Further, if granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed. In the well considered view of this Court, if the amendment as sought is allowed, no right accrued to the defendant would get defeated as the plaintiff instead of now claiming exclusive right in item nos.2 and 3 of the plaint schedule properties is only claiming a half share and mesne profits by way of amendment. Therefore, allowing of the amendment and permitting the plaintiff to claim an alternative relief would be advantageous to the defendant and does not cause any prejudice as the

plaintiff is not changing her original stand.

12. Coming to the aspect of delay, on the basic facts which are pleaded in the affidavit in support of the petition for amendment of plaint to enable the plaintiff to seek alternative relief in so far as item nos.2 and 3 of the plaint schedule properties, this Court is of the considered view that it would be a sound exercise of discretion to permit amendment of the plaint and that on the ground of mere delay amendment cannot be refused. Since the dominant purpose of the Rule is to minimize the litigation and to enable the parties to have all the issues relating to one dispute resolved in one suit, the amendment sought for by the plaintiff can be allowed, in the considered view of this Court. As rightly pointed out, the question whether the plaintiff would be entitled to the main relief or the alternative reliefs now being claimed by way of proposed amendment cannot be prejudged while considering an application, which is filed for seeking the amendment of the plaint. The amendment, even if permitted at this belated stage, helps in avoiding the multiplicity of the proceedings and in setting at rest the dispute between the parties once and for all.

13. Therefore, for all the aforesaid reasons this Court finds that granting of amendment of the plaint really sub-serves the ultimate cause of justice and avoids further litigation and that therefore, the amendment sought for by the plaintiff deserves to be allowed.

14. Viewed thus, this Court finds that the trial Court is not justified in dismissing the application of the plaintiff and that, therefore, the order impugned calls for interference.

15. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.61 of 2013 in OS.no.28 of 2008 stands allowed. The Court below shall now permit the plaintiff to carry out the amendment of the plaint and file a neat copy. On filing of such a neat copy, the Court shall accord permission to the defendant to file his additional written statement, if any, and frame necessary additional issues and complete the trial as expeditiously as possible and dispose of the suit preferably within a period of six (6) months from the date of receipt of copy of this order.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this Civil Revision Petition shall stand closed.

M. Seetharama Murthi, J

13th April, 2016.

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[1] (2012) Supreme Court Cases 300
[2] (2008) 1 Supreme Court Cases 364
[3] (2009) 2 Supreme Court Cases 409
[4] (2009) 10 SCC 84
[5] (2008) 5 SCC 117
[6] 2013(1)ALD 1(SC)

[7] AIR 2004 SC 4102
[8] (2002) 7 SCC 559