

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO
Civil Revision Petition No.2687 OF 2016

ORDER:

The revision petitioner is plaintiff/ D.Hr. in O.S.No.2689 of 1987. It was a suit for permanent prohibitory injunction maintained against the police Transport Association Petlaburz, Hyderabad by said plaintiff/ revision petitioner, Math Khaki Baba Sri Ram Mandir, Petlaburz, Hyderabad. It was in respect of the property i.e. out of Ac.5.00cts. or so, covered by the plaint schedule and the decree schedule T.S No.7 Block-E, Ward No.231 of Shere-e-Hyderabad village of Bahadurpura Mandal, Hyderabad district, and particularly in relation to the area covered by Fort wall of an extent of 704 sq.mtrs, as 'Hyderabad Nawab own property' recorded in column Nos.23 and 24 of T.S.L.R., THE dispute revolves. The claim is that there is a passage through said property to the temple(matt) property. It is pursuant to the permanent injunction decree in O.S.No.2689 of 1987 E.P.38 of 2012 was filed by the D.Hr. supra on 17.05.2011 alleging that the J.Dr/defendant-police Transport Association blocked the passage by raising wall and by violating the decree.

2. It was in the Execution Petition enquiry, at the instance of the J.Dr. supra, Advocate-Commissioner was appointed and the Commissioner filed report stating that there is a wall in existence of last 150 years, however piece of said wall to an extent of 5.7metres is constructed 5 years ago. While so, the Decreeholder also filed E.A.No.100 of 2013 for removal of the newly constructed wall saying the J.Drs. are coming in the way for removal of said newly constructed area of the wall that blocked the passage to the mutt. The contention of

J.Drs. supra was that it was an age old and existing wall and the same is not part of mutt property.

3. The prayer in the E.A.No.100 of 2013 supra filed under Section 151 of CPC, is to implement the trial Court's order dated 16.09.2013 in E.P.No.38 of 2012. In fact, said order dated 16.09.2013 gives liberty to the D.Hr. to cause remove the newly constructed portion of the wall that obstructed the passage to the mutt. The order supra was impugned by the J.Dr. supra in C.R.P.No.4367 of 2013 and went unsuccessful.

4. From the factual background, there was an order dated 26.11.2013 in E.A.No.100 of 2013 supra by the learned VI Junior Civil Judge, City Civil Court, Hyderabad, saying there is no force in the argument of the learned counsel for the J.Dr. that southern boundary mentioned in the schedule property of the decree as Rampard and if there is any existence of passage through Rampard, it ought to have been mentioned in the schedule itself as in the report of the Commissioner appointed later by the Court, there was a mention about the 100 years old wall and therein a small piece of wall was constructed about 4 years back upto a height of 3.25metres on northern side of the transport of the transport Association Office of the J.Dr. On northern side, there is a passage of about 5.7 metres between the wall and the Association of J.Dr. and to reach the mutt of D.Hr., one has to pass through the 5.7metres passage that is through the newly constructed wall. The southern boundary mentioned thereby is correct as newly constructed wall was not covered with Rampard to sustain the argument of J.Dr. and Ex.R.1 which is the sketch map of the wall reveals the wall is a protection wall of Musi bed. But once the Commissioner and his report indeed shows the passage was through newly constructed wall, it cannot be ignored.

5. It was answered in negative for the other argument that the decree is for prohibitory injunction and removal of wall sought in E.A.No.100 of 2013 is for a mandatory relief that could not be considered. In this regard it referred *Gurdev Singh Vs. Narain Singh*¹ where on facts in a suit for permanent injunction restraining the defendants after filing and obtaining a decree, a tree was planted by the defendants and the D.Hr. asked for uprooting the tree, the executing Court ordered for its removal based on Commissioner's report and upheld by the High Court in revision and when the matter reached the Apex Court, it was held that the decree did not speak removal of the tree already planted and the D.Hr. failed to establish whether the tree in question was self-grown or planted by the J.Dr. and executing Court can not go beyond the decree and thereby could not have been directed for its removal and it requires determination whether the tree in question was in existence since prior to passing of the decree or not in remanding to the executing Court.

6. It was observed therefrom by the lower Court in the impugned order that there was no dispute of the piece of the wall is not there prior to passing of the decree as the Commissioner's report reveals its age is 4 years; whereas, the decree was dated 03.03.1988 to say prior to passing of the decree that portion of wall was not in existence. Thereby the decision has no application and ordered in allowing the petition directing the bailiff to cause remove the disputed wall which blocked the passage.

7. It was while so, pursuant to the order in E.A.No.100 of 2013, dated 26.11.2013 under execution, E.A.No.115 of 2013 was filed by the District Collector, Hyderabad as third party claimant under Order XX1

¹ AIR 2008 SC 630

Rule 99 of the C.P.C. resisting the execution of the decree in O.S.No.2689 of 1987 dated 03.03.1988 supra. It is the claim that the subject matter of the suit property comprising of Ac.7.00Guntas is not entitled by the plaintiff of the suit as the TSLR shows the same form part of TS No.1/3, Block-A, Ward No.202, Nampally village recorded as 'Government Musi River, and T.S.No.1,Block-E, Ward No.231 and T.S.No.7, Block-E, ward No.231 of Shere-e-Hyderabad village, Bahadurura Mandal, Hyderabad district, and the entire extent belongs to the government and recorded as T.S.No.1/3, Black-A, Ward-202 Nampally village recorded as Government Musi River and T.S.No.1, Black-E, Ward 231 as 'Hyderabad Nawab Own Property' and T.S.No.7, Black-E, Ward No.231 as 'Fort Wall' in TSLR column Nos. 20 and 22 and T.S.No.1, Black No.D Ward 231 recorded as G.Temple of of Shere-e-Hyderabad village, Bahadurpura Mandal. In fact to implement the orders in E.P.No.38 filed E.A.No.100 of 2013 by the D.Hr., there was an application in E.A.Nos.121 and 122 of 2013 to challenge the claim by the District Collector in E.A.No.115 of 2013 supra on maintainability so also against the E.A.No.116 of 2013 and when the D.Hr. impugned by maintaining the C.R.P.No.1686 and 1727 of 2014 those were disposed of by order dated 23.01.2015 with the observation directing the executing Court to decide the claim of the District Collector in E.A.No.115 and 116 of 2013 as expeditiously as possible within the timeframe of 6 weeks and produce copy of the order thereafter within ten days and all contentions are left open and the D.Hr. is entitled to challenge any order passed in E.A.No.115 and 116 of 2013.

8. It is pursuant to which the enquiry in E.A.No.115 and 116 of 2013 while so going on, the Revenue Divisional Officer by name Smt. Nikhila filed her chief examination affidavit on behalf of the claimants and she

was cross-examined in part it appears as C.W.1. It is while things stood thus by mentioning that in the course of cross-examination in part, it is noticed about mis-description inadvertently in the claim petition of the handwritten contents without initial or signature as schedule of property of plaintiff in the 2nd schedule instead of saying as Government land of the Ac.5-00guntas and hence it is required to be corrected instead of schedule of property of plaintiff as claim petition schedule property.

9. It is an application filed under Order VI Rule 17 C.P.C. in E.A.No.12 of 2015. The learned VI Additional Junior Civil Judge under the impugned order dated 17.03.2016 allowed the same. It was the observation that even though due diligence is required on the part of the petitioner, the Court is left still with discretion even after commencement of trial, where it comes to the conclusion of despite due diligence, party could not raise the matter and in the present case, the Revenue Divisional Officer, Nkhila examined as C.W.1 in the cross in part and stated it is not the property captioned as second schedule in the claim petition of the plaintiff, thereby it is required to be corrected to rectify the mistake instead of punishing since absolutely necessary as R.D.O. herself stated as a wrong mention of '*schedule property of plaint*' instead of '*claim petition schedule property*' and thereby the amendment was allowed.

10. The contentions in the grounds of revision vis-à-vis the oral submissions are party cannot withdraw the admission made in the pleadings and no amendment can be permitted to withdraw such admission and the same cannot be allowed to amend in tune to the evidence adduced apart from there is no lack of due diligence and the lower Court should have dismissed the application in stead of allowing.

The learned counsel placed some expressions in support of his contentions.

11. Whereas, it is the submission of the Government Pleader for Arbitration representing the claim petitioner-revision 1st respondent i.e. the District Collector by supporting the order of the lower Court.

12. Heard both sides at length and perused the material on record.

13. The claim petition to be decided is like a suit and it is a deemed decree under Order XXI Rule 10 CPC and even under Section 47 CPC when it questions the very executability in the claim for a deemed decree to be passed in allowing or not allowing is on merits in full-dressed trial and the very reading of Section 141 of CPC shows the procedure applicable for trial of suits should apply even to applications and thereby Order VI Rule 17 of CPC amendment petition though contended as not sustainable is sustainable and the trial Court's entertaining and disposing of on merits thereby to that extent no way requires interference but for whether there are merits to allow or not is only to consider in the revision.

14. The learned counsel for D.Hr/ revision petitioner relied mainly in Smt.Neeta Narang vs Smt. Beena Valicha², where it is observed by the Apex Court that though the Court should be liberal in allowing the applications to amend pleadings, they must bear in mind the statutory limitation from the amended proviso who speaks of due diligence, to say pre-trial and pending trial amendments stand on different footing therefrom. On facts, it was observed that despite appellant said to have discovered the existence of wall on 05.02.2007, no question was put to the witness on 01.03.2007 in this regard and only at a far later stage,

² (2009) 14 SCC 525

application sought to file additional written statement and thereby once dismissed, it no way requires interference. For that conclusion, the Apex Court referred the earlier expression in *Vidyabai & Ors vs Padmalatha*³ among other. Another decision placed reliance is *Gaddam Buchanna vs M. Rajagopala Chary*⁴ single judge expression of this Court, where it was observed that once there is an admission in evidence, it is in relation to the material alterations in the promissory note, the amendment petition could not even be allowed to withdraw much less to give a finding touching the merits of the main suit therein. In *Rajesh Kumar Aggarwal vs K.K. Modi*⁵, it was held that the Court should allow amendments that may be necessary for determining the real question in controversy between the parties, provided it does not cause injustice to the other side as the real controversy itself is the basic and cardinal test and in discharge of the primary duty of the Court where such an amendment is necessary to decide the real dispute between the parties, the Court should not go into correctness or falsehood of the facts sought in the amendment and record finding on the merits of the amendment at this stage of considering the same and Court is also bound to take subsequent events to shorten the litigation and preserve and safeguard rights of both parties so to subserve the ends of justice. When a fresh suit can be filed, why the amendment cannot be permitted and rejection by the High Court is thereby hold incomprehensible for seeking additional relief since necessary to determine the real controversy. Expression in *M/S. Revajeetu Builders and Developers vs M/S. Narayanaswamy & Sons*⁶ was in fact considered and relied by the lower Court in permitting the amendment, where it was also referring to the

³(2009) 2 SCC 409

⁴ (2008) 2 ALD 738

⁵ (2006) 4 SCC 385

⁶ (2009) 10 SCC 84

earlier expressions at length including by considering the post CPC amendment and insertion of the proviso on due diligence and that it is discretionary power of the Court to exercise judiciously. No doubt when the Court finds bona fide, legitimate, honest and necessary amendments. The basic test for grant or refusal of amendment is whether it is necessary to determine the real question in controversy for proper and effective adjudication of the lis and potentiality of prejudice or injustice likely to cause to the other side be taken into consideration by the Court if necessary by awarding costs in allowing the amendment, but for the proposed amendment otherwise constitutionally and fundamentally changes the nature and character of the lis and about six guidelines are laid down therein as parameters on broad perspective.

15. Coming to the other decision in Ram Naranjan Kajaria Vs. Sheo Prakash Kajaria⁷, it was held that under the guise of amendment, admissions in the pleadings cannot be permitted to be withdrawn but for amendment application can be made for explaining and clarifying the admissions. It is the three judge Bench expression referring to earlier case law in this regard. In fact, this Court in considering most of the expressions supra in Smt. Mareddy Seetharatnam Vs. Sruvuri Venkatarama Raju in CRP No.1751 of 2016, dt.07.10.2016 observed that Court also got even trial of suit commenced to permit amendment to subserve the ends of justice even by invoking Order VI Rule 17 or Sections 151 to 153 of CPC where the Court feels such an amendment is necessary to subserve the ends of justice and to shorten the litigation and by taking into consideration for any subsequent event and where it is necessary to resolve the real matter in controversy despite the proviso speaks limitation of right of a party on the due diligence aspect. In this

⁷ (2015) 10 SCC 203

expression even the expression *supra* relied on by the learned counsel for revision petitioner/ D.Hr. referred, also from what was laid down more particularly by the constitution Bench in the Salem Advocate Bar Association, Tamilnadu vs Union Of India⁸ of the due diligence construction must be liberal to subserve the ends of justice.

16. Here, no doubt in the affidavit petition for amendment, it is clearly mentioned that it is an inadvertence mention that was since noticed immediately cause filed the application for amendment. However, the one limitation that is required to consider in this case as also held in the expression in M.Sitaratnam *supra* and by the Apex Court in Ram Niranjana Khajaria *supra* is that an admission cannot be permitted to be withdrawn, though amendment to explain or clarify an admission can be allowed. The lower Court did not consider properly the same in permitting substitution of the words '*claim petition schedule property*' by deletion of the words '*schedule of property of plaintiff*'. As the amendment cannot be allowed to withdraw but for to explain an admission the lower Court should have held, instead of withdrawal of '*schedule of the property of plaintiff*' should have been added to it as same is mistakenly mentioned and it requires to be read as claim petition schedule property. Had it been done, it is in tune to the constitution Bench expression in Ram Niranjana Khajaria *supra* and as the amendment is necessary to explain said admission in the pleading so to allow and but for that there is nothing to interfere with the impugned order of the lower Court.

17. Accordingly and in the result, the revision is disposed of by modifying the order of the lower Court in E.A.No.12 of 2015 allowing the amendment of deletion of '*schedule of property of plaintiff*' by replacing

⁸ 2005(3) R.C.R. (Civil) 530

with '*the claim petition schedule property*' as while retaining '*schedule of property of plaint*' permitted to amend "as same is outcome of mistake, hence to be read as '*claim petition schedule property*'. There is no order as to costs.

Consequently, pending miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 15.11.2016
Vvr

