

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH

C.R.P.Nos.1751, 1752 & 1753 of 2016

Between:

C.R.P.No.1751 of 2016

Smt. Mareddy Seetharathnam

.....Petitioner

and

Sruvuri Venkatarama Raju and another

.....Respondents

C.R.P.Nos.1752 & 1753 of 2016

Smt. Mareddy Seetharathnam

.....Petitioner

and

Sruvuri Venkatarama Raju and 3 others

.....Respondents

Date of Judgment pronounced on : 17-10-2016

HON' BLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers
May be allowed to see the judgments? : Yes/ No
2. Whether the copies of judgment may be marked
to Law Reporters/ Journals: : Yes/ No
3. Whether The Lordship wishes to see the fair copy
Of the Judgment? : Yes/ No

* HON' BLE DR. JUSTICE B. SIVA SANKARA RAO
+ C.R.P.Nos.1751, 1752 & 1753 of 2016

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> HEAD NOTE:

! Counsel for the petitioner : Sri Vedula Srinivas

^ Counsel for the respondents : Sri S. Subba Reddy

? Cases referred

1. ILR-33-Bom 644 (1900)
2. 47 IA 255 (1920)
3. 1957 SCR 438 at 450
4. 1957 SCR 595 at 603 = AIR 1957-SC-363
5. AIR 1969 SC 1267
6. AIR 1961 SC 325=1 SCR 982
7. 1995 Supp. (3) SCC 17
8. (2010) 14 SCC 596
9. (2001) 6 SCC 163
10. 2016(1) SCC 332
11. (2001) 8 SCC 561
12. (2001) 6 SCC 163 at 168
13. (2002) 7 SCC 559
14. (2013) 9 SCC 576
15. 2016 (1) ALT 806
16. 2006 (3) ALT 206 = (2)ALD 784
17. AIR 2005 SC 3353
18. 2005(5) SCJ 519
19. 2005(3) SCJ 303
20. 2007(2) SCJ 569
21. 2008(14)SCC 364 = AIR 2008 SC 2303
22. 2012 (2) SCJ 436 = AIR 2012 SC 811=(2012)2 SCC 300=2012(1)SCALE 330
23. 2005(12)SCC 1
24. 2008(5) SCC 117

25. 2005(5) ALT 429
26. 2008(5) ALD 322
27. 2011(5) ALD 445
28. 2014(2) ALT 526
29. 2014 (2) ALT 526
30. 2014(3) ALD 361=(2)ALT-640
31. (2006)4 SCC 385
32. 2015 (2) ALT 594
33. AIR 1922 PC 249
34. AIR 2007 SC 2511
35. 2009(10)SCC 626
36. AIR 2004 SC 4102
37. AIR 2007 SC 113
38. (2007)6 SCC 737
39. AIR 2008 SC 2234 = (2008)5 SCC 117
40. (2009)11 SCC 329
41. 2005 (13) SCC 89
42. 1973(2)Andh. W. R. 253
43. AIR 2009 SC 2544
44. AIR 2006 SC 2832
45. AIR 2007 SC 1663
46. 1995 Supp (3) SCC 179
47. 2000 (1) SCC 712 = AIR 2000 SC 614
48. 1976 (4) SCC 320 = AIR 1977 SC 680
49. AIR 2009 SC 1433
50. 2009 (10) SCC 84=AIR 2009 SC (Supp) 2897
51. 2011 (12)SCC 268
52. 2008 (15) SCC 610
53. AIR 2009 SC 1177
54. 2016 (3) ALT 655
55. 2016 (3) ALT 211
56. 2016 (2) ALT 63 = 2015(1) LS201.
57. 2007 (1) ALT 43 (SC)
58. (2013) 9 SCC 374
59. AIR 2002 SC 665
60. AIR 2011 SC 3265
61. AIR 1960 SC 335
62. AIR 1936 PC 264
63. AIR 1954 Bombay 95
64. AIR 1959 SC 504
65. AIR 1956 SC 593
66. AIR 1967 SC 341
67. AIR 1967 SC 1134
68. (1970) 1 SCC 558
69. AIR 1979 SC 861
70. 2016 (1)ALT (SC)1
71. 2008 (7) SCC 85 = (5) SCJ 844
72. 1984 (1) SCC (supp) 594
73. AIR 1978 SC 484=(1978)2 SCC 91=(1978)2 SCR 614
74. (1974)1 SCC 242 para 27
- 75.** 2015(4) SCC 182



HON' BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION Nos.1751, 1752 AND 1753 OF 2016COMMON ORDER:

Against the orders dated 07.12.2015 and 08.01.2016 passed in dismissing the three applications filed in I.A.Nos.1446, 1447 and 1449 of 2015 respectively, that were filed by the revision petitioner under Order VI Rule 17 CPC for amendment of the plaint in O.S.No.509 of 2012 and the written statements respectively in O.S.Nos.106 of 2009 and 507 of 2012, the three revision petitions are maintained.

2. The parties in these three revision petitions are almost one and the same (to be detailed below) and therefrom at request of the learned counsel for the parties, all the three revision petitions are taken up for common hearing and disposal.

3. Coming to the relevant factual background:

(a). The revision petitioner in all the three revisions by name Smt. M. Seetharatnam is the Plaintiff in O.S.No.509 of 2012 and 2nd defendant in O.S.Nos.160 of 2009 & 507 of 2012 respectively. From the above, the suit of revision petitioner-plaintiff in O.S.No.509 of 2012 is first in point of time filed as O.S.No.633 of 2000 before its renumbering on transfer supra.

(b). She filed the suit O.S.No.633 of 2000 and same while pending on the file of 5th Additional Senior Civil Judge, Visakhapatnam, transferred to the file of the 2nd Additional District Judge, Visakhapatnam and is renumbered and pending as O.S.No.509 of 2012, for the reliefs of setting aside the registered sale deeds said to have been executed by her on 04.06.1998 and 05.06.1998, vide document Nos.1243 & 1244 of 1998, in favour of the 1st defendant-Sruvuri Venkata Rama Raju, whose wife is the 2nd defendant-Ammaji and the other defendants 3 & 4 are by names Smt. M. Ramadevi and Smt. S. Padmavatamma. It is alleging in the plaint that said sale deeds are null and void, for not supported by consideration and having been obtained by fraud and coercion.

(c). She is no other than the 2nd defendant in O.S.Nos.160 of 2009 and 507 of 2012, out of the three defendants including her husband and son respectively, that were filed for recovery of mortgage money on the foot of alleged mortgage deeds dated 28.11.1997 and 05.02.1996. The defendants 1 to 4 of O.S.No.509 of 2012 supra are the plaintiffs in O.S.No.507 of 2012 and the defendants 1 & 2 of O.S.No.509 of 2012 supra are the plaintiffs in O.S.No.160 of 2009.

(d). The three suits are under contest with respective plaint claims and its denial with written statements rival claim. The suits while in trial progress, she sought for amendment of the plaint in O.S.No.509 of 2012 and the respective written statements in O.S.No.160 of 2009 and O.S.No.507 of 2012 and it is against dismissal of said three petitions for amendment of the pleadings, the three revisions filed as referred supra.

4. Heard both sides at length and perused the material on record and the provisions and propositions placed reliance as per rival contentions of both sides, one side is impugning the legality and correctness of the orders in seeking to allow the revisions and the other side is supporting the orders in seeking to dismiss the revisions.

5. Now, the common points that arise for consideration are:-

(i) Whether the three impugned orders require interference by sitting in revision and if so, with what observations and what extent respectively?

(ii) To what relief?

POINT No.1:

6. Before discussing facts further, it is needful to discuss scope of law on amendment of pleadings prior to and subsequent to the CPC amendments.

6.(a). Coming to the scope of Order VI Rule 17 prior to the amendment by Acts 46/99 & 22/2002, several expressions of the Constitutional Courts referring to and relying upon the pre-constitutional expressions of the privy council and several High courts and Courts of other countries laid down that even at the stage of second

appeal amendment of pleadings can be allowed, if it is necessary to shorten the litigation or to decide real controversy between parties or to avoid future complications like in final decree proceedings or execution, provided that does not affect or prejudice the rights of the opposite parties, muchless changes the cause of action, for belated seeking is not a ground to reject, but for to award costs to compensate other side.

6.(a).(i). It was as early as in the year 1900, the Bombay High Court in *Kisandas Rupchand Vs. Rachappa Vithoba*¹-held that-all amendments to be allowed satisfy two conditions: (a) of not working injustice to other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.

6.(a).(ii). Twenty years later, the Privy Council in *Charan Das Vs. Amir Khan*² held that though there is full power to make the amendment, such a power should not as a rule be exercised where the effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are out-weighed by the special circumstances of the case.

6.(a).(iii). This statement of the law was quoted with approval in *L. J. Leach & Co. Ltd. Vs. Jardine Skinner & Co.*³ that courts would, as a rule, decline to allow amendments, if a fresh suit on the amended claim would be barred by limitation on the date of the application. But that is a factor to be taken into account in exercise of the discretion as to whether amendment should be ordered, and does not affect the power of the court to order it, if that is required in the interests of justice.

6.(a).(iv). This statement of the law was expressly approved by a three Judge Bench of the Apex Court in *Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil*⁴ by holding on facts that the amendment did not really introduce a new fact at all, nor did the defendant have to meet a new claim set up for the first time after the expiry of the period of limitation.

¹ ILR-33-Bom 644 (1900)

² 47 IA 255 (1920)

³ 1957 SCR 438 at 450

⁴ 1957 SCR 595 at 603 = AIR 1957-SC-363

6.(a).(v). In *Jai Jai Ram Manohar Lal Vs. National Building Material Supply, Gurgaon*⁵, the Apex Court referring to the earlier expression in *Purushottam Umedbhai & Co vs M/S Manilal And Sons*⁶ held in permitting amendment of plaint within the discretion of Court saying on technical grounds such amendment where necessary shall not be refused for the facts involved mentioned name of wrong person instead of real plaintiff, then question of limitation does not arise as it has to be treated as originally instituted in the name of the real plaintiff though his name is later amended, particularly from Paras 5 & 6 observed that rules of procedure are intended to be handmaid to the administration of justice. A party cannot be refused relief merely because of same mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting malafide, or that by his blunder, he had caused injury to his opponent which cannot be compensated for by an order of costs. However negligent or careless may have been the first motion and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to other side. Any mis-description even amendment can be allowed under Section 153 CPC and need not always be under Order VI Rule 17 CPC. The well settled rule is that all amendments should be permitted as may be necessary for the purpose of determining the real question in controversy between the parties, unless by permitting the amendment injustice may result to the other side. The power to grant amendment of pleadings is intended to serve the ends of justice and is not governed by narrow or technical limitation. There was in fact an observation of Court without even application for amendment has power to grant leave to rectify any mis-description or bonafide mistake.

6.(a).(vi). In *K. Raheja Constructions Ltd. & Anr. Vs. Alliance Ministries & Ors.*⁷ It was held by the Apex Court turning down such amendment as time-barred that the belated application filed after seven years to amend the plaint in the suit for permanent injunction to suit for specific performance of contract, having expressly

⁵ AIR 1969 SC 1267

⁶ AIR 1961 SC 325=1 SCR 982

⁷ 1995 Supp. (3) SCC 17

admitted that respondents have refused to abide by the terms of the contract and the period of limitation being three years therefrom under Article 54 of the Schedule to the Limitation Act, 1963, any allowing of the amendment would defeat the valuable right of limitation accruing to the respondent. See also *Van Vibhag Karamchari Griha Nirman Sahkari Sanstha Maryadit (Registered) v. Ramesh Chander and Ors.*⁸.

6.(a).(vii). In *Vishwambhar & Ors. v. Laxminarayan (Dead) through LRs & Anr.*⁹, suit originally filed for recovery of possession on the basis that the alienations made by their mother-guardian were void and therefore liable to be ignored since they were not supported by legal necessity and without permission of the competent court and the alienations did not affect the interest of the plaintiffs in the suit property; an amendment was sought to be made after the limitation period had expired, for a prayer of declaration that the sale deeds dated 14-11-1967 and 24-10-1974 be set aside, recovery of possession of the properties sold from the respective purchasers, Section 8(2&3) of the Hindu Minority and Guardianship Act, 1956, say the natural guardian shall not, without previous permission of the court, transfer by sale any part of the immoveable property of the minor and any disposal in contravention of it is voidable at the instance of the minor or any person claiming under him. If in law the plaintiffs were required to have the sale deeds set aside before making any claim in respect of the properties sold, then a suit without such a prayer was of no avail to the plaintiffs as Article 60 of the Limitation Act prescribes a period of three years for setting aside a transfer of property made by the guardian of a ward, by the ward who has attained majority and the period is to be computed from the date when the ward attains majority. Since the limitation started running from the dates when the plaintiffs attained majority the prescribed period had elapsed by the date of presentation of the plaint so far as Digamber is concerned. By the date the defect was rectified (December 1985) by introducing such a prayer by amendment of the plaint the prescribed period of limitation for seeking such a relief had elapsed even against

⁸ (2010) 14 SCC 596

⁹ (2001) 6 SCC 163

others. In the circumstances, the amendment of the plaint held could not come to the rescue of the plaintiff.

6.(a).(viii). In *L.C. Hanumanthappa (since died) rep by LRs Vs. H.B. Shivakumar*¹⁰ relying upon several expressions including by quoting with approval *Siddalingamma and Anr v. Mamtha Shenoy*¹¹ it was held that the doctrine of relation back to date of suit would apply to all amendments made under Order VI Rule 17 of the Code of Civil Procedure, which generally governs amendment of pleadings, unless the court gives reasons to exclude the applicability of such doctrine in a given case and for no question of limitation was argued on the facts and costs can usually compensate for an amendment that is made belatedly.

6.(a).(ix). In *Vishwambhar v. Laxminarayan*¹² it was held that if as a result of allowing the amendment, the basis of the suit is changed, such an amendment even though allowed, cannot relate back to the date of filing the suit to cure the defect of limitation.

6.(a).(x). In *Sampath Kumar Vs. Ayyakannu*¹³ Application for amendment made 11 years after the date of the institution of the suit to convert through amendment a suit for permanent prohibitory injunction into a suit for declaration of title and recovery of possession was allowed holding, the basic structure of the suit is not altered by the proposed amendment and if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit by allowing the amendment that would curtail multiplicity of legal proceedings.

6.(a).(xi). In *Prithi Pal Singh and Anr. v. Amrik Singh*¹⁴ the Apex Court in a suit claiming pre-emption, amendment of plaint sought claiming that plaintiff is entitled to relief as a co-sharer of the suit property, held that it is reasonable to presume that the amendment in the plaint would relate back to the date of filing the suit.

¹⁰ 2016(1) SCC 332

¹¹ (2001) 8 SCC 561

¹² (2001) 6 SCC 163 at 168

¹³ (2002) 7 SCC 559

¹⁴ (2013) 9 SCC 576

6.(a).(xii). *B. Srinivasulu Vs. B. Kusuma Kumari*¹⁵ this Court, referring to Order VI Rule 17 after amendment by Acts 46/ 99 & 22/ 2002, from earlier expressions of this court including in *Duggumati Malakonda Reddy and another Vs. Puligunta Malakonda Reddy*¹⁶ held that the amended provisions and rigour of due diligence apply to suits filed after 01.07.2002 for same is prospective and not retrospective in operation, even amendment of pleadings sought after 01.07.2002.

6(b). Coming to the scope of Order VI Rule 17 after amendment by Acts 46/ 99 & 22/ 2002, from several expressions of the Constitutional Courts, that liberal approach is curtailed by taking away the right of parties to seek amendment, once trial is commenced by Amended Act, unless due diligence is shown. It is no doubt some liberal approach, without rigidity, is required to adopt from the wording despite the proviso requires due diligence of the party seeking amendment once trial is commenced, for the Court has to satisfy from the material to consider such amendment despite trial commenced, with the earlier approach in all traits of resolving the real controversy to the lis, reducing life to the litigation, avoid multiplicity of proceedings and sub serving ends of justice, as procedural law is the hand maid and not mistress of justice and amendment of pleadings is part of the procedural law.

6(b)(i). For more clarity, the amended Order VI Rule 17 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 be 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”

6(b)(ii). From the above, the proviso even curtails the right of parties to seek amendment of pleadings after commencement of trial, it contains an exception conferring the discretionary powers on the Courts to permit amendment of pleadings after commencement of trial, if it satisfies from the facts and circumstances that

¹⁵ 2016 (1) ALT 806

¹⁶ 2006 (3) ALT 206 = (2)ALD 784

despite due diligence party could not seek the amendment, to subserve the ends of justice.

6(b)(iii). This is the important rider required to be satisfied, no doubt in other respects at the cost of repetition, the law existing prior to the amendment by Acts 46/ 99 and 22/ 2002 comes to the aid of the Court if that condition is satisfied. It was the interpretation initially laid down by the Apex Court in Salem Advocate Association TN Vs. Union of India¹⁷, that by the 2002 Amendment, which added the *Proviso to Order VI Rule 17*, the burden of proof has been shifted upon the applicant who makes the application for amendment after the trial has commenced, to prove that despite due diligence he could not have raised the issue before the commencement of trial.

6(b)(iv). This is for the purpose of preventing frivolous application to delay the proceedings as reiterated in Salem Advocate Bar Association, T.N V. Union of India¹⁸ known as Salem Bar Association case-2.

6(b)(v). No doubt it was held in Kailash V. Nankhu¹⁹ that trial commences from hearing and settlement of issues and filing of chief affidavit of plaintiff.

6(b)(vi). The scope of Order VI Rule 17, after amendment by Act 22 of 2002, with effect from 01.07.2002, enlightened in said expression of *Salem Bar Association Case-2 supra was relied upon in Ajendraprasadji N.Pande V. Swami Keshavprakeshdasji N.*²⁰ holding that, under the proviso no application for amendment shall generally be allowed after trial has commenced, unless despite of due diligence, the matter could not be raised before commencement of the trial.

6(b)(vii). In Rajkumar Gurawara (dead) through LRs V. S.K.Sarwagi & Co. Pvt. Ltd.²¹ it was held at Para No.13 that though pre-trial amendments can be allowed on such terms where Court finds just, for once trial commenced the showing of due

¹⁷ AIR 2005 SC 3353

¹⁸ 2005(5) SCJ 519

¹⁹ 2005(3) SCJ 303

²⁰ 2007(2) SCJ 569

²¹ 2008(14)SCC 364 = AIR 2008 SC 2303

diligence as per proviso to Order VI Rule 17 C.P.C is the prerequisite. These expressions in fact say the basic requirement of due diligence is to be satisfied, once trial is commenced, though for the pre-trial amendment it can be liberal made subject to other riders.

6(b)(viii). In J.Samuel V. Gattu Mahesh²², it was held by the Apex Court at paras 16 to 22 in nutshell by referring to Ajendraprasadji supra that the word “due diligence” is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Due diligent efforts is a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipatory relief. The term due diligence is specifically used in the Code so as to provide a test for determining whether to exercise the discretion the situations of requested amendment after the commencement of trial or not. The term due diligence determines the scope of a party’s constructive knowledge, claim and is very critical to the outcome of the suit. No doubt, typographical errors or mistakes that can be considered otherwise, however, when plaint is supposed to be signed by the party and at the advice of the counsel signed and verified the pleading by showed some attention, this omission could have been noticed and rectified there itself, that also cannot be construed as due diligence.

6(b)(ix). Said due diligence concept was even earlier considered in this regard by the Apex Court in Union of India Vs. Pramod Gupta²³ and observed that delay and latches of the parties to seek amendment is also one of the relevant factors in this regard and same is reiterated in Chander Kanta Bansal Vs. Rajinder Singh²⁴.

6(b)(x). This Court in Rachabattuni Govinda Rao V. Jonnadula Sambasiva Rao²⁵ on facts held the amendment sought in the suit for recovery of amount, to incorporate a statement to the effect that the consideration was paid through a

²² 2012 (2) SCJ 436 = AIR 2012 SC 811=(2012)2 SCC 300=2012(1)SCALE 330

²³ 2005(12)SCC 1

²⁴ 2008(5) SCC 117

²⁵ 2005(5) ALT 429

cheque drawn on S.B.I, after the facts elicited in the cross-examination of P.W-1 held cannot be allowed for lack of due diligence.

6(b)(xi). This Court in *Sluveru Lakshamma V. Sluveru Sankaraiah*²⁶ on facts held that afterthought amendments after commencement of trial can be disallowed as unexplained delay and latches are also grounds to negate the amendment. The Court referred *Pioneer Builders supra* and also *Salem Bar Association case supra* for arriving the conclusion.

6(b)(xii). This Court in *Narne Estates (P) Ltd V. N.Gopal Naidu*²⁷ held relying upon the expression of the Apex Court in *Ajendraprasadji supra* that petition filed five years later to the plaint adding prayer for declaration of G.P.A executed in favour of the 1st respondent by various land owners while he was working as Director of the Company, for amendment of the same is unsustainable for lack of due diligence.

6(b)(xiii). The other expression of this Court in *Muthukur Gram Panchayat rep. by its Executive Officer V. Kakuturu Ramesh Reddy*²⁸ was in the suit for permanent injunction filed claiming easementary right to restrain the defendant-Panchayat from making any constructions in the suit site, plaint sought amendment after commencement of trial and during cross-examination of plaintiff was dismissed for lack of due diligence.

6(b)(xiv). In *Veluri Raja Rajeswari v. Veluri Santhansagar Reddy*²⁹, this Court also held the pre-requisite where trial commenced to show due diligence for not seeking the amendment of the pleading earlier.

6(b)(xv). In the later expression of this Court in *Waheeda Begum V. Md.Yakub*³⁰ by referring to several expressions including the *Rajkumar Gurawara supra* particularly at para No.24 it was held that as per the expression, it confers

²⁶ 2008(5) ALD 322

²⁷ 2011(5) ALD 445

²⁸ 2014(2) ALT 526

²⁹ 2014 (2) ALT 526

³⁰ 2014(3) ALD 361=(2)ALT-640

jurisdiction on the Court to allow either party to alter or to amend the pleadings at any stage of the suit and on such terms as may be just, provided such amendment seeks determination of the real question and controversy between the parties; that pre-trial amendments are to be allowed more liberally, than those amendments sought to be made after commencement of the trial. It also referred J.Samuel supra particularly in para No.26 in saying that no application for amendment shall be allowed after the trial has commenced, unless the Court has come to the conclusion that inspite of due diligence, the party could not raise the matter before the commencement of the trial. It also referred the expression in Rajesh Kumar Agarwal V. K.K.Modi³¹ that the Court can take note of events subsequent to the filing of the suit, where necessary, to shorten the litigation. It is by referring to the expressions, it was held on the facts in Waheeda begum supra that the petitioners could establish that in spite of due diligence they could not raise the matters before commencement of trial and the bar laid down under proviso to Order VI Rule 17 C.P.C thus no way applied and consequently dismissal of the amendment petition by the trial Court is held unjustified.

6(b)(xvi). In Rajesh Kumar Agarwal supra, it was held further that Courts should allow amendments which are necessary for the purpose of determining the real questions in controversy between the parties provided it does not cause injustice to other side.

6(b)(xvii). The other expression of this Court in G.S. Prakash Vs. Polasa Hanumanlu³², holds that when the proposed amendment is explanatory in nature and not taking away any admission purportedly made nor taking away right of defence, the rejection on the ground of the amendment loses valuable defence is unsustainable for the plaintiff must prove his pleading including additional pleading and defendant can set up any further defence by additional written statement and the approach must be liberal to such amendments as held by Bramwell L.J. in Tidderley Vs. Harper (1878 10 CHD 393) and Pollock J in Steward Vs. NMT Company (1886 16 QB 178),

³¹ (2006)4 SCC 385

³² 2015 (2) ALT 594

relied by the Privy Council in *Mashwe Mya Vs. Maung Mo Hnaung*³³ by the Apex Court in *Pirgonda supra* of twin considerations are not working injustice to other side and being necessary for determining real questions in controversy.

6(b)(xviii). Coming to delay in seeking amendment whether a ground by itself or deciding of real questions in controversy concerned, it is referring to some of the expressions among other of the Apex Court, in *Andhra Bank V. ABN Amro Bank N.V*³⁴ it was held by the Apex Court that, delay by itself is no ground for refusal of prayer for amendment, as the only question to be considered by Court is whether such amendment would be necessary for decision of the real controversy between the parties in suit and at that stage the Court cannot go into question of merit of amendment. Once trial commenced, amendment sought, to satisfy the requirement of due diligence.

6(b)(xix). In *Surender Kumar Sharma V. Makhan Singh*³⁵ the Apex Court observed that merely because the amendment sought is belated that does not liable to be rejected on the ground of delay, where Court feels allowing of the application resolves the real controversy between the parties.

6(b)(xx). In *Pankaja V. Yellappa*³⁶ and *State of A.P. V. Pioneer Builders*³⁷, the Apex Court held that mere delay itself is not a ground to reject the amendment when it results to multiplicity of proceedings.

6(b)(xxi). It was held by the Apex Court in *Ramachandra Sakharam Mahajan V. Damodar Trimbak Tanksale*³⁸ that when the amendment sought for would enable the Court to pin-pointedly consider the real dispute between the parties and thereby help to render a decision more satisfactorily, it ought to be allowed.

³³ AIR 1922 PC 249

³⁴ AIR 2007 SC 2511

³⁵ 2009(10)SCC 626

³⁶ AIR 2004 SC 4102

³⁷ AIR 2007 SC 113

³⁸ (2007)6 SCC 737

6(b)(xxii). The Apex Court in *Chander Kanta Bansal V. Rajinder Singh Anand*³⁹ held that in a suit for injunction restraining the defendant from obstructing the lane in the suit property, defendant seeking amendment of written statement after closure of evidence of both sides to file partition agreement that was not brought in the course of evidence and the same when allowed by amendment to bring in evidence tantamounts to retracting what was pleaded in the written statement and said amendment cannot be allowed for lack of due diligence, in saying that while exercise of discretion care should be taken to see that injustice and prejudice of an irremediable character are not inflicted upon the opposite party under pretence of allowing amendment. It was also held that an amendment which appears clearly to be an afterthought to be disallowed.

6(b)(xxiii). The Apex Court in *Peethani Suryanarayana V. Repaka Venkata Ramana Kishore*⁴⁰ held that Court holds power to allow such amendment, provided the application is bonafide and does not cause injustice to either side and does not affect the rights already accrued to the other side. It was on facts in the suit for partition amendment of plaint saying some typographical error is there as to subject matter that requires correction when it causes no prejudice to the so called pendentelite purchasers of suit land by correction of survey Nos.462 and 463 from what plaint originally described of Survey No.165, when that Survey No.165 is re-assigned as 463 and the mentioning is to correct the typographical mistake. For that conclusion referred *Sajjan Kumar V. Ram Kishan*⁴¹ para-5 holding the amendment sought is for the purpose of bringing to the record the real question in controversy between the parties and refusal to permit the amendment would create needless complications at the stage of execution in the event of the appellant-plaintiff succeed in the suit.

6(b)(xxiv). In fact, the boundary description survey number or boundaries if outcome of bonafide mistakes can be allowed if not come under Sections 152 or 153 C.P.C at least under Section 151 C.P.C to subserve the ends of justice. In this regard,

³⁹ AIR 2008 SC 2234 = (2008)5 SCC 117

⁴⁰ (2009)11 SCC 329

⁴¹ 2005 (13) SCC 89

it was laid down way back in the expression of this Court in Kalkonda Pandu Rangaiah

V. Kalkonda Krishnaih⁴² as follows:

“As a result of the above discussion my conclusions on the three points formulated above are as follows:- Where clerical or arithmetical mistakes occur in copying the plaint schedules from the documents anterior to the suit the proceedings in the suit can always be corrected under Section 152 C.P.C. In such cases even the documents on the basis of which the suit was filed may be amended either in a suit under Section 31 of the Specific Relief Act or in a proper case even by an application under Section 152 C.P.C provided it is a case of mis-description and not one of disputed identity. In such cases, if Section 152 is invoked it would obviate a suit which would ultimately bring the same result. In all cases, where clerical or arithmetical errors creep-in in the plaint and as a consequence in the decrees as well, they can be rectified at any time even after a final decree. A case of such an amendment petition under Section 152 C.P.C. filed in a pending suit even after a preliminary decree is passed therein is an a fortiori case”.

6(b)(xxv). The Apex Court in *Sushil Kumar Jain vs. Manoj Kumar*⁴³ relying upon *Baldev Singh & Ors. v. Manohar Singh*⁴⁴ & *Usha Balashaheb Swami & Ors. v. Kiran Appaso Swami*⁴⁵, *Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary (Dead)*⁴⁶ & *B.K. Narayana Pillai v. Parameswaran Pillai*⁴⁷ which relied upon *M/s. Modi Spinning and Weaving Mills Co.Ltd. & Anr. Vs. M/s. Ladha Ram & Co.*⁴⁸ held as under:

"At this stage, we may remind ourselves that law is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering, substituting a new cause of action. It is equally well settled that in the case of an amendment of a written statement, the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed." Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case. Even the decision relied on by the plaintiff in *Modi Spinning* (supra) clearly recognises that inconsistent pleas can be taken in the pleadings.

⁴² 1973(2)Andh. W. R. 253

⁴³ AIR 2009 SC 2544

⁴⁴ AIR 2006 SC 2832

⁴⁵ AIR 2007 SC 1663

⁴⁶1995 Supp (3) SCC 179

⁴⁷ 2000 (1) SCC 712 = AIR 2000 SC 614

⁴⁸ 1976 (4) SCC 320 = AIR 1977 SC 680

It was also stated, while allowing the amendment of the written statement, this Court observed in Basavan Jaggu Dhobi's case (supra) as follows: "As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his statement under Order 6, Rule 17 CPC by taking a contrary stand than was stated originally in the written statement. This is opposed to the settled law open to a defendant to take even contrary stands or contradictory stands, the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action. This being the position, we are therefore of the view that inconsistent pleas can be raised by defendants in the written statement although the same may not be permissible in the case of plaint."

6(b)(xxvi). The Apex Court in *Vidyabai & Ors. v. Padmalatha*⁴⁹, held that it is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. The three important factors to be taken into consideration while considering the application for amendment are:

1. Whether the amendment sought for is necessary in determining the real controversy of dispute between the parties?
2. Whether the application for amendment is bona fide?
3. Whether the amendment sought for, if allowed, causes prejudice to the other side which cannot be compensated adequately in terms of money?

6(b)(xxvii). The Apex Court in the case of *M/s. Revajeetu Builders & Developers v. Narayanaswamy & Sons & others*⁵⁰ held as under: "65. The Courts have consistently laid down that for unnecessary delay and inconvenience, the opposite party must be compensated with costs. The imposition of costs is an important judicial exercise particularly when the courts deal with the cases of amendment. The costs cannot and should not be imposed arbitrarily. In our view, the following parameters must be taken into consideration while imposing the costs. These factors are illustrative in nature and not exhaustive.

- (i) At what stage the amendment was sought?
- (ii) While imposing the costs, it should be taken into consideration whether the amendment has been sought at a pre-trial or post-trial stage;
- (iii) The financial benefit derived by one party at the cost of other party should be properly calculated in terms of money and the costs be awarded accordingly.
- (iv) The imposition of costs should not be symbolic but realistic;
- (v) The delay and inconvenience caused to the opposite side must be clearly evaluated in terms of additional and extra court hearings compelling the opposite party to bear the extra costs.

⁴⁹ AIR 2009 SC 1433

⁵⁰ 2009 (10) SCC 84=AIR 2009 SC (Supp) 2897

- (vi) In case of appeal to higher courts, the victim of amendment is compelled to bear considerable additional costs. All these aspects must be carefully taken into consideration while awarding the costs."

6(b)(xxviii). The Apex Court relying upon *M/s. Revajeetu Builders supra* held in *State of M.P. Vs. Union of India*⁵¹, *Ashutosh Chaturvedi V. Prano Devi*⁵² and *South Konkan Distilleries & Anr. V. Prabhakar Gajanan Naik*⁵³ that though courts have ample power to allow amendment of plaint, said power should be exercised in the interest of justice and to determine the real questions in controversy between the parties and on such terms as may be just, amendment cannot be claimed as a matter of right and court should not also adopt a hyper technical approach but a liberal approach and by compensating other side by costs. In *South Konkan Distilleries supra*, it was held further that whether claim is barred by limitation or not is a mixed question of fact and law, amendment cannot be rejected, but for to decide during trial on merits of that aspect. It was also held particularly at para-11 that Courts must be extremely liberal in granting prayer for amendment, if the court is of the view that if such amendment is not allowed, the party prayed for it shall suffer irreparable loss or injury or injustice.

6(b)(xxix). In *Molli Eswara Rao vs. Kurcha Chandra Rao*⁵⁴, it was held by this court that admittedly, the respondent herein filed the present application after commencement of trial and according to proviso to Order VI Rule 17 C.P.C., it is incumbent and obligatory on the part of the person applying to show that despite exercising due diligence, such application could not be filed before commencement of trial.

6(b)(xxx). In *J.Yadagiri Reddy and others vs. J.Hemalatha and others*⁵⁵, also this Court observed that even in cases where an application for amendment of plaint is filed after commencement of trial, the amendment should be allowed if the amendment sought does not require any evidence to be led specifically or additionally by either of the parties to decide the rights of the parties as the object of the Court

⁵¹ 2011 (12) SCC 268

⁵² 2008 (15) SCC 610

⁵³ AIR 2009 SC 1177

⁵⁴ 2016 (3) ALT 655

⁵⁵ 2016 (3) ALT 211

should be not to punish a party for any mistake committed in filling the plaint initially. There also in the suit for declaration of sale deeds are null and void and amendment sought for as not binding on plaintiff which is about nine years after filing of suit and long after commencement of trial and the suit was almost at fagend of trial.

6(b)(xxxi). In *P.Durga Reddy and another v. B.Yadi Reddy*⁵⁶ it was relying upon the expressions of the Apex Court in *State of AP v. Pioneer Builders*⁵⁷ and *Sameer Suresh Gupta v. Rahul Kumar Agarwal*⁵⁸ observed by this court that delay by itself is not a ground to reject the amendment when it can be allowed on other considerations, for the delay, other side can be compensated by costs.

6(b)(xxxii). In *B.Srinivasulu Vs. B.Kusuma Kumari* supra it was relying upon several expressions of the Apex Court, observed by this court that amendment when required to resolve real controversy and to avoid future complications including in execution for any ambiguity in property descriptions, the amendment held can be allowed and same is reiterated in another expression in CRP No.3393 of 2015, dt.25.08.2015 relying upon *Surender Kumar Sharma* supra of the Apex Court, that amendment is required to be allowed to resolve real controversy and to avoid multiplicity of proceedings.

6(c). As laid down in *Omprakash Gupta Vs. Ranbir B.G.*⁵⁹ there can be a change of law that needs amendment. Substantive law change may be either prospective or retrospective. If it is a prospective change then it normally not effect cause of action and matter in issue in the pending suit; but where it is a retrospective change, amendment might be needed and shall be allowed. If it is a change of procedural law then normally pleadings will not be allowed to be amended but the court shall itself take note of the change of procedural law.

6(d). Further, as held by the Apex Court in *Delhi Development Authority Vs. S.S. Agarwal*⁶⁰ Order VI Rule 18 of the Code of Civil Procedure casts a duty on the

⁵⁶ 2016 (2) ALT 63 = 2015(1) LS201.

⁵⁷ 2007 (1) ALT 43 (SC)

⁵⁸ (2013) 9 SCC 374

⁵⁹ AIR 2002 SC 665

⁶⁰ AIR 2011 SC 3265

party to carry out the amendment, if allowed by the Court, within the time limited for the said purpose by the order and if no time is thereby stated, then within 14 days from the date of the order. In case the party fails to carry out amendment within said period, he shall not be permitted to carry out the amendment after expiry of the time limited, unless the time is further extended by the Court.

6(e). Coming to the contentions that an admission made in the written statement or plaint or evidence cannot be allowed to be withdrawn concerned, withdrawal of admission is different from explaining an admission if made inadvertently or otherwise, for same is not conclusive for that can be explained away at any time before its making use, for otherwise not a conclusive proof but for relevant to use as a piece of proof and use as estoppel to wriggle out from unequivocal and unexplained admission.

6(e)(i). It is well laid down expression of the three judge bench of the Apex Court in *Mrs. Rukhmabai Vs Lala Laxminarayana*⁶¹ at para-19 by relying upon the Privy council's expression *Alluri Venkatapathi Raju Vs Danthuluri Venkata Narasimha Raju*⁶² that, it sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and there it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue.

6(e)(ii). Further court is not confined merely to look into the form of the transaction between the parties concerned; the well laid down expression of the Apex Court in *Provident Investment Company Limited Vs Court of I.T.*⁶³ at para-3 speaks in this regard that, Court is not confined merely to look into the form of the transaction between the parties (in giving effect to the legal rights and obligations there under), but the true legal position that arises out of it (by ignoring the form to ascertain real nature) in which the transaction was embodied and for that the Court may even look at the surrounding circumstances in construing the fact covered by oral

⁶¹ AIR 1960 SC 335

⁶² AIR 1936 PC 264

⁶³ AIR 1954 Bombay 95

statement or document, with reference to the substance and subject to the limitations for admissibility of oral over documentary evidence under Sections 91 and 92 of the Evidence Act.

6(e)(iii). In *Kishori Lal v. Mr. Chaltibai*⁶⁴ it was held by the Apex Court that admissions were not conclusive and that the maker of the admissions is at liberty to prove that the admissions were made mistakenly or that the admissions were untrue, unless such admissions otherwise operate as estoppel. The Supreme Court also noticed in that case that admissions are mere pieces of evidence and that if the truth relating to the matter admitted is known to the parties, the admissions would not be considered as admissions in the true sense.

6(e)(iv). In *Nagubai Ammal v. B. Shama Rao*⁶⁵ the Apex Court held as under: “An admission is not conclusive as the truth of the matter stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to his detriment, when it might become conclusively by way of estoppels.”

6(e)(v). In *Basant Singh v. Janki Singh Kishuyndhari Singh*⁶⁶ the Apex Court held that admissions by a party in a plaint duly signed and verified by him may indeed be used as evidence against him in another suit and that such admissions, however, cannot be recorded as conclusive, so much so, the party can show that the contents of the admissions were not true.

6(e)(vi). In *Ramrati Kuer v. Dwarika Prasad Singh*⁶⁷ with reference to the admissibility of a statement u/s.32(3) of the Evidence Act, it was held the Apex Court held that it must be shown that the person making the admission knew that it was against his pecuniary and proprietary interest before admission u/s.32(3) of the Evidence Act.

⁶⁴ AIR 1959 SC 504

⁶⁵ AIR 1956 SC 593

⁶⁶ AIR 1967 SC 341

⁶⁷ AIR 1967 SC 1134

6(e)(vii). In *Chikkam Koreswara Rao v. Chikkam Subba Rao*⁶⁸ the Apex Court held that admissions of the party relating to the nature of the properties whether they are self-acquired or ancestral properties is liable to be harmonized with the circumstances of the case to appreciate the correct state of affairs.

6(e)(viii). In *Avadh Kishore Dass v. Ram Gopal*⁶⁹ it was held by the Apex Court that evidentiary admissions were not conclusive proof of facts admitted and that such admissions could be explained or shown to be wrong, the Supreme Court held that such admissions would operate as estoppel shifting the burden of proof on to the person making the admissions. The Supreme Court also observed that unless it is shown that the admissions are wrong, the admissions tantamount to proof of the facts admitted.

6(e)(ix). In *Ram Nirajan Kajaria Vs. Sheo Prakash Kajaria*⁷⁰ it was held by the Apex Court relying upon *Gautam Sarup Vs. Leela Jetly*⁷¹, *Panchodeo Narain Srivastava Vs. Km. Jyoti Sahay*⁷² that relied its earlier expression in *Ganesh Trading Co. Vs Moji Ram*⁷³ and *Modi Spinning and weaving mills Co. Ltd.* Supra and also *Nagin Das Ram Das Vs Dalpatrm Iccharam*⁷⁴ that admissions made in the written statement cannot be permitted to be withdrawn by way of amendment, but for to clarify or explain away and any alternative plea though permissible to take by amendment, same cannot be destructive to each other.

6(e)(x). In *Mount Mary Enterprises Vs. Jivratna Medi Treat Pvt. Ltd.*⁷⁵ it was held by the Apex Court that application for amendment of plaint generally can be granted at any stage of the proceedings unless by virtue of which nature of suit is changed or prejudice is caused to defendant.

7. Amendment of pleadings from the above is basically for the purpose of bringing about final adjudication in a lis and to avoid multiplicity of proceedings and shorten litigation and where it is necessary to determine the real controversy. It is in

⁶⁸ (1970) 1 SCC 558

⁶⁹ AIR 1979 SC 861

⁷⁰ 2016 (1) ALT (SC) 1

⁷¹ 2008 (7) SCC 85 = (5) SCJ 844

⁷² 1984 (1) SCC (supp) 594

⁷³ AIR 1978 SC 484=(1978)2 SCC 91=(1978)2 SCR 614

⁷⁴ (1974)1 SCC 242 para 27

⁷⁵ 2015(4) SCC 182

the interest of justice that a suit shall be decided on all points of controversy and accordingly, it is needed that the party shall be allowed to alter or amend their pleadings during the pendency of the suit. According to Order VI Rule 17 of the Code of Civil Procedure, 1908, the Court may allow the amendment at any stage of the proceedings and for such purpose it may impose conditions i.e. in the form of cost or any other condition. The Court has been given discretion in this regard and the mandatory guidelines upon the Court as well as upon the party seeking amendment is that they shall make only such amendments which are necessary for determination of real controversy between the parties to the suit. At the same time, the *Proviso* to Order VI Rule 17 puts a mandate upon the Court not to allow such amendment after the trial has begun (i.e. if issues have been settled), if it finds that the party could have raised the pleadings by due diligence at an earlier point of time. However, the *Proviso* need not be given a very rigid effect in all cases as the same is subject to the discretion of the Court, for procedural law does not come in the way to determine real matters in controversy so to permit for rendering substantial justice between parties and to avoid multiplicity of proceedings and life to litigation and of anticipatory future complications. The main object of the legislation is to enable the Court to allow amendment at any stage and thereby delay itself is not a ground to refuse, but for not to permit where there is by such amendment changes cause of action or tantamounts to withdrawal clear admissions unexplained or amendment plea to introduce is mutually destructive or where claim is time barred and allowing it causes grave prejudice and injustice to rights accrued to other side than by refusal. Even alternative pleas are permissible and in case of plaintiff, to choose one to the other inconsistent, though defendant is entitled to take inconsistent pleas even as alternative defences. The purpose of the *Proviso* cannot thereby do away with the intent of the legislation. Thus, if an application for amendment of pleadings has been filed after trial has begun, the Court will normally be tilted against the applicant, if it could be raised by due diligence at any earlier stage of proceedings. But in proper cases if the point to be amended is very essential to the suit, the Court may, in the interest of justice and equity, allow the amendment on such conditions as the Court

deems fit and proper in the facts and circumstances of the particular case, including as to costs for non showing of due diligence and for delay and laches.

8. From above propositions on amendment of pleadings, coming back to the facts, the evidence affidavit in chief filed on dated 09.12.2004, of the revision petitioner-plaintiff in O.S.No.633 of 2000, long before its transfer and renumbering as O.S.No.509 of 2012, speaks that the sale deeds obtained by 1st defendant dated 04.06.1998 & 05.06.1998 are outcome of fraud and coercion, null and void and not binding so to declare as sought for, defendants 1 and 2 obtained mortgage dated 28.11.1997 on same property and she paid interest every month to them and even they demanded either to discharge in toto or to execute conditional sale for the ground and first floors of the building in favour of the 1st defendant and similarly defendants 1 to 4 obtained mortgage for building bearing No.81, P.S.No.688 near Srinagar, Visakhapatnam and she paid interest and they demanded to discharge in toto else to execute sale deed and it is pursuant to the demands of defendants 1 and 2 by playing fraud and coercion, she executed the conditional sale deeds in full discharge of mortgage debts to re-convey on payment of entire due while keeping possession with her including collection of rents from the tenants of ground and first floors of the building and even she discharged the entire mortgage debts, the defendants fraudulently failed to re-convey and failed to return the mortgage deeds by endorsing the full discharge and even the sale deeds are since nominal the consideration mentioned was utterly low to market value to avoid stamp duty burden and their mortgage suit claims are fraudulent outcome by suppressing the facts long after she filed the suit and the sale deeds are liable to be set aside and for there is nothing due and payable. She stated issuing of legal notice and belated reply with false averments and also placed reliance on Khararunama dated 04.06.1998 in proof of the same. Ex.A4 is the said Khararunama agreement between plaintiff and defendants 1 and 2 supra. The same is no doubt marked subject to objection in her chief examination recorded while taking chief affidavit on oath by trial Court on 09.12.2004. In the cross examination of PW1-plaintiff(revision petitioner) on 08.02.2005, it is brought on record of she is staying there at Srinagar near Pama

Talkies of Visakhapatnam of the premises door No.48-7-46 which consists of three floors viz., ground + 2 and her residence therein is at 2nd floor and at ground floor there is Laxmi Bharathi Book Stall and first floor occupied by Tirumala Kumar for real estate business and contractor, and the mortgage executed in favour of the 1st defendant by her was in the year 1996, February; though stated mistakenly as if in April from poor memory and for 2 mortgages were there and the amount taken on the first one is only Rs.1,00,000/- and in the further cross examination dated 02.08.2005 she deposed that she got son and two daughters and her husband is RTC clerk retired in 1994 and her son did his M.B.A. and she executed the documents for conditional purpose to discharge only the mortgage debt and not as sale deed to convey and the contents were not read over to her and her husband at the time of execution and registration and the 2nd mortgage obtained for Rs.3,00,000/- on 28.11.1997, whereas 1st mortgage on 05.02.1996 for Rs.1,00,000/- and she informed her counsel in preparing pleadings that she did not receive 3 lakhs in 2nd mortgage and the rate of interest mentioned 36%p.a., and she paid interest regularly upto March, 1997 under 1st mortgage and receipts issued for part payments but not endorsed on the mortgage deed reverse side and for 2nd mortgage there is no money paid and the mortgage was for entire building and she issued legal notice stating no amount issued in 2nd mortgage and not liable to liquidate and liquidated the 1st one. She deposed that prior to Laxmi Bharathi Book Stall of one Brahamam present tenant of ground floor there used to one tenant one Satyanarayana Reddy, who vacated. She deposed that the 2 sale deeds obtained on 04th and 5th of June 1998 and she attended Sub Registrar Office for registration respectively and it was on the fraud and coercion saying to discharge or to execute and to pay in 30 instalments what is claimed due to reconvey, obtained and for no consideration and she issued notice thereby to pay what is due under mortgage and reconvey and the documents obtained were for 1/3rd share of the building, which she later came to know from enquiry in filing the suit and there was a mention about cheques issued, however the amounts covered by the cheques on 04.06.1998 for Rs.1,00,000/- withdrawn by 1st defendant, having obtained her signature on the reverse side from Vijaya Bank by saying he will adjust the same out

of amount due and did not endorse on the mortgage deeds said fact and for 2nd day cheque for Rs.80,000/- given drawn on Vijaya Bank not encashed and there was even stop payment instructions.

9. Leave it as it is, coming to the crucial further aspects of the cross examination dated 25.10.2005 concerning the proposed amendment aspects, she deposited with reference to Ex.A4 Khararunama Agreement as scribed a day prior to the Ex.A1 and 1st defendant brought the scribe of it and the contents of Ex.A4 were not read over and 1st defendant hand over the same only in the year 1999 and it is therefrom she cause issued notice through advocate. She deposited that 1st defendant's elder brother and wife were also signatories to Ex.A4, besides herself and her husband and she did not witness who attested and stood as identified witnesses for Exs.A1 and A2. She denied the suggestion of 1st defendant or his brother or his wife did not execute Ex.A4 and it is a fabricated document to support her suit claim. The 1st defendant filed his chief examination affidavit that was taken on oath on 22.02.2006, who is a record assistant/clerk in L.I.C. from 1995 and originally a sub staff before that. DW.2-brother of 1st defendant stated that he attested Ex.A4-Khararunama agreement and he does not remember from the recitals plaintiff has to pay Rs.13,15,000/- on or before 04.12.2000 and 1st defendant has to transfer back the property covered by the sale deeds in favour of plaintiff.

10. The proposed amendment sought in I.A.No.1449 of 2015 in the suit was to incorporate in Para 3 of the plaint the words 'usufructuary' by deletion of 'simple' before registered mortgage and also to incorporate that on the date of execution of sale deeds on 04.06.1998 and 05.06.1998 respectively, she, her husband and son as 1st party and defendants as 2nd party executed the Khararunama oppudala odambadika agreement with a condition to reconvey the property mentioned therein in respect of the financial dealings mentioned under 11 Paras and as per Khararunama supra plaintiff to receive Rs.5,00,000/- from defendants, but defendants did not pay which leads to breach of the agreement and for non-payment plaintiff sent legal notice dated 10.11.1998 and a false reply received from defendants 1 and 2 denying

execution of Khararunama and thereby they cheated and the alleged sales obtained by fraud and the Khararunama conditions not complied with in order to grab the properties under the guise of the nominal sale deeds under which plaintiff did not sell for never intended to sell and the reply averments of those are the sales for consideration is utterly false and no vendor-vendee relation, but for debtor-creditor relation and it is the defendants 1 and 2 make believe the plaintiff in so obtaining by played fraud and undue influence taking advantage of the plaintiff money needs and obtained to serve as security for the amounts as mentioned in the Khararunama [and the mortgages are usufructuary mortgages] and plaintiff is ready to comply with Khararunama conditions [and defendants are collecting rents pursuant to the mortgages from the tenants] and in the cause of action para to mention that defendants did not comply the terms of Khararunama dated 04.06.1998 and did not pay agreed amount of Rs.5,00,000/- after obtaining the sale deeds and in the relief portion to incorporate as reliefs a.1 and b.1 to declare the said sale deeds dated 04.06.1998 and 05.06.1998 bearing Nos.1243 and 1244 of 1998 as null and void and due to non compliance of terms of Khararunama supra, in nutshell which is not by reproducing exact words of amendment sought but for the gist.

11. The reasons for amendment sought from the supporting affidavit are that the suit filed for cancellation of the sale deeds and the same was transferred and renumbered for simultaneous disposal with other two suits filed by the defendants against her and the original plaint filed through previous counsel was wrongly mentioned total contents by suppressing real facts and circumstances happened between inter se in respect of mortgage money, mortgage deeds and mortgaged properties and plaint is not informative about real facts and the previous counsel suppressed the Khararunama contents of Ex.A4 dated 04.06.1998 between the plaintiff and defendants 1 and 2, where all real facts and total financial transactions mentioned and it was fortunately exhibited though notice and reply not exhibited that also of the vital documents and those were not mentioned in the plaint and after plaintiff's suit supra defendants filed the other two suits covered by registered usufructuary mortgage deeds and the amounts covered thereunder also mentioned in

the Khararunama and at this juncture, she changed the counsel and from whose advice the necessity of the amendments sought. The counter filed by 1st respondent (D.1) adopted by other respondents (D.2 to D.4) in opposing the amendment petition in nutshell is that the Khararunama agreement Ex.A4 is not genuine, it is unenforceable, having executed simple mortgage deeds for consideration received, now she is making every possible effort to avoid payments and the proposed amendments cause prejudice to them and the term ayaveju thanaka dastaveju is non-indicative in these districts as usufructuary mortgage and sought for dismissal.

12. The observation of the lower Court from the pleadings and referring to *Revajetu Builders, Surendra Kumar Sharma, T.Raja Reddy, North Eastern Railway Administration, Usha Devi and Rajesh Kumar Agarwal supra*, was that the basic principles from the expressions to consider is whether the amendment is bonafide or malafide and leads to any injustice and prejudice to other side, as seen from the proposed amendment the potentiality of prejudice or injustice likely to be caused to other side is high for it would expunge the admission made by the plaintiff of the mortgage deeds are simple and deprive defendants to take it as defence therefrom and thereby there are no bonafides and that too the petition for amendment of plaint filed 15 years of the suit filed and the Khararunama factum pleaded was for the first time in the proposed amendment in seeking the relief of declaration of sale deeds as null and void and the supine indifference is not explained and thereby not a fit case to permit amendment.

13. Coming to the other 2 amendment applications in the suits O.S.Nos.160 of 2009 & 507 of 2012 as one of the three defendants therein for amendment of written statements, to incorporate after Para 16 of her written statement facts almost similar therein but in brief saying the mortgage deeds are not simple but usufructuary transferring only usufruct of the building and not the building and plaintiffs of the mortgage suits are collecting rents therefrom since the mortgages and not submitted accounts and the sale deeds obtained are only conditional one to reconvey and never intended to sell, but for executed as security for the moneys borrowed as agreed and

written in Khararunama with terms and conditions in 11 paras of it with no vendor-vendee relation but of debtor and creditor relation and defendants are ready to pay balance amount to plaintiffs after deduction of rents collected for all these years out of mortgaged property and rule of damduput is also applied. Same was opposed by counter of 1st plaintiff, adopted by other plaintiffs of both suits respectively with similar facts as pleaded in the counter of amendment petition in O.S.No.633 of 2000 (O.S.No.509 of 2012 supra). By further saying the blame on the earlier advocate is untrue, he was a senior advocate and having duly signed the pleadings now she is trying to throw blame on the advocate and the Khararunama contents are untrue and the notice and reply and Khararunama contents are not even mentioned in the plaint O.S.No.633/ 2000 and the sales are for consideration and there are no grounds to permit amendment of the written statements.

14. Those petitions for amendment of written statements were also ended in dismissal before the self same trial Judge holding said amendments change defence and cause prejudice to other side and introduce new cause and they did not plead the collecting of rents by plaintiffs from date of mortgage to introduce said plea for the first time and said amendments proposed are mutually destructive, for written statement speaks simple mortgage and now to introduce as usufructuary mortgage, though defendant is entitled to inconsistent pleas but cannot of mutually destructive pleas.

15. From the above, so far as earlier pleading mentions the mortgages as simple and she is in possession and enjoyment with tenants under her and now to introduce as usufructuary mortgages and accounting to be made and the mortgagees are in possession and are enjoying the usufruct is not only withdrawal of earlier version but also introducing a mutually inconsistent version, same no doubt cannot be permitted but for to say defendant can take any number of inconsistent pleas to non suit the plaintiff including alternative inconsistent defences and it is not such a case here while keeping on record of the factum mentioned of the simple mortgage by further explaining but for choosing to withdraw and introduce inconsistent new fact.

16. No doubt if the mortgage deeds contain a recital of usufructuary, within the scope of Sections 91 and 92 of Evidence Act from the evidence let in and to be let in on record, the trial Court can consider in deciding the lis by appreciation of entire evidence on record irrespective of who let in what evidence for entire matter at large to arrive at the truth and needless to say from the position of law referred above from several expressions of an admission even can be explained away though cannot be permitted to withdraw and introduce a mutually inconsistent new version. Thus so far as the 2 suits covered by mortgage concerned so also in the suit for cancellation of or declaring the two sale deeds as null and void and not binding, the plea sought in relation to the amendment of simple mortgage admission into usufructuary mortgage concerned there is nothing to permit for this Court while sitting in revision but for clarifying the legal position from what is covered by the orders of the lower Court in giving disposal of the revisions in this regard and to that extent but for permitting amendments in relation to the Khararunama.

17. From this coming to the Khararunama concerned, it is already exhibited as Ex.A4, no doubt subject to objection of the other side. Even for no plea no evidence can be looked into, same became academic from evidence already let in as referred supra particularly in O.S.No.633 of 2000=509 of 2012 and there is chief and cross examination in relation to Khararunama and if at all the defendants 1 and 2 and brother of 1st defendant of O.S.No.509 of 2012 not signatories and their signatures allegedly forged, it is a matter from evidence on record to appreciate however on that count when delay in seeking amendment itself is not a ground to refuse as per the settled expressions referred supra and even originally there is no plea regarding the Khararunama once there is evidence and lack of plea became academic from both parties understood the evidence involving the Khararunama with contents already exhibited subject to objection regarding proof to appreciate, the amendment in relation to Khararunama can be permitted, that to by giving right to file additional written statement to the defendants in respect of the Khararunama. It is also from the settled law that even in the absence of plea by amendment sought for any reason not permitted once evidence brought on record and there is by necessary implication

from said evidence awareness of the issue involved of the Khararunama and its contents and genuineness, from the said evidence is available for appreciation, lack of plea became academic and the evidence can be looked into, the amendment has to be allowed for the same is no way barred by limitation nor it confers for lack of plea any vested right in favour of the opposite party nor by introduction of the same any way changes cause of action to the suits nor causes any prejudice for evidence already brought on record to appreciate and when necessary to decide the real question in controversy as to the nature of transaction of the two sales and 2 mortgages with reference to the Khararunama contents but for at best by imposing costs.

18. Accordingly and in the result:

18(a). CRP.No.1753 of 2016 is allowed in part while setting aside the dismissal order of the lower Court dated 08.01.2016 in I.A.No.1449 of 2015 in O.S.No.509 of 2013 (old suit O.S.No.633 of 2000) by permitting the amendment in part and subject to costs of Rs.3,000/- to be payable before the lower Court within the time fixed by it and to the extent after Para III (i) to the plaint as Paras (j) to (r) other than (q) may be added:

“j) The plaintiff further most humbly submits that on the date of execution of sale deeds dated, 04-06-1998 and 05-06-1998, plaintiff and her husband along with her son as 1st party and the defendants as a 2nd party executed a document by name “Khararunama Oppudala Odambadika Agreement”, where the condition of re convey of the Plaint schedule properties is mentioned. More over the total financial dealings between plaintiff and defendants were clearly mentioned under 11 Paras.

k) As per the said Khararunama the plaintiff has to receive Rs.5,00,000/- (five lakhs only) from the defendants 1 and 2, as agreed. But the defendants 1 and 2, did not paid total Rs.5,00,000/- after execution of the conditional sale deeds, which lead to breach of agreement. The condition of re convey of the plaint schedule properties is mentioned in the Khararunama only. Plaintiff agreed to execute sale deeds dated 04-06-1998 and 05-06-1998, as the defendants 1 and 2 agreed to pay Rs.5,00,000/- after execution the said sale deeds.

l) As the total amount was not paid to the plaintiff by the defendants 1 and 2 as agreed, plaintiff sent a legal notice dated 10-11-1998 to the defendants through their counsel K.S.Sankar, demanding them to pay entire agreed balance amount out of agreed

total of Rs.5,00,000/-, for which a false reply denying the execution of the Khararunama was given by the defendants. Thus the defendants cheated the plaintiff for their unlawful gain. Thus the alleged sale deeds dated 04-06-1998 and 05-06-1998 were obtained by the defendants 1 and 2 by playing fraud. Thus the terms and conditions mentioned in the Khararunama Oppudala Odambadika Agreement were not complied by the defendants 1 and 2, where as the plaintiff performed her part of obligation by way of execution of the sale deeds.

m) Thus, the defendants did not complied the terms and conditions mentioned in the Khararunama Oppudala Odambadika Agreement in order to grab the plaint schedule properties in the guise of sale deeds dated 04-06-1998 and 05-06-1998. In fact the sale deeds are nominal sale deeds. Plaintiff never intends to sell the plaint schedule property. Those are only conditional sale deeds.

n) Defendants stated in the reply dated 21-11-1998 that they purchased the plaint schedule properties for valuable sale consideration, which is utterly false. The relation between the plaintiff and the defendants is only debtor and creditor relationship but not the vendor and vendee in the sale deeds transaction. But the conditions and terms are mentioned in separate document stated supra under the name "Khararunama Oppudala Odambadika Agreement" where on both the parties signed in the presence of S.A.N. Paju.

o) Due to need of money, plaintiff believed the words of the defendants 1 and 2 and agreed for all the conditions and terms as per their wishes. Taking the advantage of need of money to the plaintiff, defendants 1 and 2 played undue influence and made her to execute sale deeds.

p) plaintiff executed the alleged sale deeds dated 04-06-1998 and 05-06-1998 towards an additional security for the amount that is to be received from the 1st and 2nd defendants as agreed which was reduced to writing in the said Khararunama Oppudala Odambadika Agreement.

q)

r) Plaintiff is ready and willing to comply all the terms and conditions of the said Khararunama. She is ready to pay the monies due if any by her as per the Khararunama after deducting the rents collected by the 1st and 2nd defendants as the mortgage deeds are usufructuary mortgage deeds in nature and the defendants 1 and 2 are collecting rents."

And in cause of action Para IV at Page No.6 line No.10 after void; the following sentence to be added:

"And as the defendants 1 and 2 did not comply the terms and conditions of the Khararunama Oppudala Odambadika Agreement and when they did not pay total agreed amount of Rs.5,00,000/- after the execution of sale deeds by the plaintiff and on when

the defendants 1 and 2 denied the very execution of the said Khararunama dated 04-06-1998 in their reply dated 21-11-1998.”

In the reliefs column under Para VI, after (a), a-1 and after (b), b-2 may be added:

“a-1) Declare that the sale deed dated 04-06-1998 vide document No.1243/ 1998 is null and void due to the non compliance of terms and conditions mentioned in the Khararunama Oppudala Odambadika Agreement.

b-2) Declare that the sale deed dated 05-06-1998, vide document No.1244/ 1998, is null and void due to the non compliance of terms and conditions mentioned in the Khararunama Oppudala Odambadika Agreement dated 04-06-1998.”

The amendment shall be carried out with consequential amendment within 14 days time to be fixed by the lower Court after receipt of the order and the costs also to be paid within such time and the trial Court shall fix time for filing any additional written statement by any of the defendants to it and if necessary to formulate any additional issue and particularly with reference to the Khararunama and permit any recall of any witness already examined and further examination of any witnesses by both sides therefrom and in accordance with law.

18(b). CRP.No.1752 of 2016 against the order dated 08.01.2016 in I.A.No.1447 of 2015 in O.S.No.507 of 2012 is allowed in part, while confirming the order of the lower Court in part in not permitting to delete the admissions made of simple mortgage and to introduce on such deletion as if usufructuary mortgage but for while saying if the mortgage deed contains a recital of usufructuary, within the scope of Sections 91 and 92 of Evidence Act from the evidence let in and to be let in on record, the trial Court can consider in deciding the lis by appreciation of entire evidence on record irrespective of who let in what evidence to arrive at the truth and from the position of law that an admission even can be explained away though cannot be permitted to withdraw and a mutually inconsistent new version cannot be permitted to introduce on withdrawal of existing contra admission but for if at all to take as alternative plea even inconsistent to the original, so far as the written statement defence concerned and by not permitting in the amendment in relation to the mortgage to convert the pleading of simple into usufructuary, permitted the amendment of the written

statement subject to costs of Rs.1,000/- within the time to be fixed by the trial Court, including for carrying out the amendment with consequential amendment (subject to plaintiffs right of rejoinder and framing of any additional issue and recalling of any witnesses for further examination to consider therefrom according to law) after Para 15 of the written statement as follows:

“ 18) The sale deeds executed by the 2nd defendant on 04-06-1998 and 05-06-1998 vide document Nos.1243/ 1998 & 1244/ 1998 are only conditional sale deeds. She never intended to sell her ground floor and first floor to the plaintiffs. These sale deeds were executed by her as an additional security for the monies borrowed by her and also for the monies to be paid by the plaintiffs to her as agreed and written in Khararunama Oppudala Odambadika Agreement (Ex.A4) filed in O.S.No.509/2012 (old suit O.S.No.633/ 2000).

19) All the real state of financial affairs took place between the plaintiffs and the defendants were clearly mentioned under 11 Paras of the said Khararunama.

20) As such there is no vendor and vendee relationship between the plaintiffs and the defendants. The relationship is only debtor and creditor.”

18(c). CRP.No.1751 of 2016 against the order dated 07.12.2015 in I.A.No.1446 of 2015 in O.S.No.160 of 2009 is allowed in part, while confirming the order of the lower Court in part in not permitting to delete the admissions made of simple mortgage and to introduce on such deletion as if usufructuary mortgage but for while saying if the mortgage deed contains a recital of usufructuary, within the scope of Sections 91 and 92 of Evidence Act from the evidence let in and to be let in on record, the trial Court can consider in deciding the lis by appreciation of entire evidence on record irrespective of who let in what evidence to arrive at the truth and from the position of law that an admission even can be explained away though cannot be permitted to withdraw and a mutually inconsistent new version cannot be permitted to introduce on withdrawal of existing contra admission but for if at all to take as alternative plea even inconsistent to the original. So far as the written statement defence concerned and by not permitting in the amendment in relation to the mortgage to convert the pleading of simple into usufructuary, permitted the amendment of the written statement subject to costs of Rs.1,000/- within the time to be fixed by the trial Court, including for carrying out the amendment with consequential amendment

(subject to plaintiffs right of rejoinder and framing of any additional issue and recalling of any witnesses for further examination to consider therefrom according to law) after Para 15 of the written statement as follows:

“ 18) The sale deeds executed by the 2nd defendant on 04-06-1998 and 05-06-1998 vide document Nos.1243/ 1998 & 1244/ 1998 are only conditional sale deeds. She never intended to sell her ground floor and first floor to the plaintiffs. These sale deeds were executed by her as an additional security for the monies borrowed by her and also for the monies to be paid by the plaintiffs to her as agreed and written in Khararunama Oppudala Odambadika Agreement (Ex.A4) filed in O.S.No.509/2012 (old suit O.S.No.633/ 2000).

19) All the real state of financial affairs took place between the plaintiffs and the defendants were clearly mentioned under 11 Paras of the said Khararunama.

20) As such there is no vendor and vendee relationship between the plaintiffs and the defendants. The relationship is only debtor and creditor.”

19. Pending miscellaneous petitions, if any, shall stand closed. No order as to costs.

17.10.2016

Note: L.R copy to be marked
(B/ o)
ska

Dr. B. SIVA SANKARA RAO, J

