

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No. 3404 of 2011

ORDER:

The unsuccessful plaintiffs brought this revision under Article 227 of the Constitution of India having been aggrieved of the orders, dated 22.07.2011, of the learned III Additional District Judge, (Judge, Fast Track Court), Ranga Reddy District at L.B.Nagar passed in I.A.No.463 of 2011 in O.S.No.390 of 2008 filed under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908, requesting to permit them to amend the plaint schedule by adding schedule 'G' and 'H' and also consequently amend the plaint as stated in the petition list.

2. I have heard the submissions of *Mrs. K.Lalitha*, learned counsel for the revision petitioners/plaintiffs (hereinafter, 'plaintiffs'). Despite service of notice, none appeared for the 1st respondent/1st defendant. It is stated that respondents 2 and 3 are not necessary parties. I have perused the material record.

3. In a suit for partition brought by the plaintiffs against the defendants for partition of the plaint 'A', 'B', 'C', 'D', 'E' and 'F' schedule properties, the plaintiffs are now seeking amendment of the plaint for adding schedules 'G' and 'H' to the original plaint schedule on the ground that at the relevant time, the plaintiffs could not get the documents related to the property covered by the said schedules and that the plaintiffs collected copies of the documents related to the said properties after filing of the suit and that the plaintiffs are also entitled to a 1/4th share in the proposed plaint 'G' and 'H' schedule properties and hence, the subject application is filed seeking amendment of the plaint schedule and consequential amendment of the plaint.

4. The case of the 1st defendant in her counter filed before the trial Court is that the suit properties are acquired by the 1st respondent/ 1st defendant with her own earnings and that the same are not liable for partition and that the suit is not properly framed and is not maintainable and that the application for amendment of the plaint filed at a belated stage is liable to be dismissed.

5. At the hearing before the trial Court, no oral and documentary evidence was adduced. On merits and by the orders impugned in this revision, the trial Court dismissed the petition *inter alia* observing that the affidavit in lieu of examination-in-chief of PW1 was already filed and that the application seeking amendment filed at a belated stage is not maintainable.

6. Aggrieved thereof, the plaintiffs filed this civil revision petition. The learned counsel for the plaintiffs reiterated the contentions of the plaintiffs, which are stated supra.

7. The learned counsel for the plaintiffs would further submit that the suit is filed for partition of the plaint 'A' to 'F' schedule properties and that at the time of institution of the suit, the plaintiffs were not having copies of the documents related to the proposed plaint 'G' and 'H' schedule properties and that therefore, they could not include the said properties in the schedule of the plaint and that subsequently, they had obtained copies of the relevant documents related to the proposed plaint 'G' and 'H' schedule properties and hence, they filed the subject petition for amendment of the plaint schedule and to consequently amend the plaint as the plaintiffs are entitled to a 1/4th share in the said proposed plaint 'G' and 'H' schedule properties also. She would also submit that if the plaint schedules 'G' and 'H' are permitted to be added, no prejudice would be caused to the defendants as from the beginning, they are contending that the suit schedule properties are of the 1st defendant/ 1st respondent and that the same are acquired with her own earnings and hence, the suit schedule properties are not liable for partition.

According to her submissions, as a suit for partial partition is not maintainable, it would be in the interest of justice to permit to include the plaint 'G' and 'H' schedule properties in the schedule of the plaint and consequently amend the plaint, as such a course would sub-serve the ends of justice and helps the Court in finally determining the disputes between the parties in one litigation without driving them to multiple litigations.

8. I have given detailed and thoughtful consideration to the facts and the submissions.

9. The plaint schedule consists of various extents of landed property comprised in schedule 'A' to schedule 'F'. According to them, at the time of institution of the suit, they could not secure all the relevant documents pertaining to the properties owned by their ancestor late Akula Madan Mohan; however, after filing the suit, the plaintiffs were able to collect the certified copies of sale deeds pertaining to two more properties acquired by late Akula Madan Mohan; the plaintiffs are entitled to a 1/4th share in the said properties also, namely, (i) Plots bearing nos.358, 359 in Sy. Nos.19, 121, 123 and 124 covering a total area of 600 square yards equivalent to 501.71 square meters situated at Padmalaya Gardens, Bommaipally village, Bhongir Mandal, Nalgonda District; and (ii) two plots bearing Nos.122/ B, 123, 124 and 125/ B in Sy.Nos.765, 770, 771, 772, 774 and 775 covering a total area of 360 square yards equivalent to 300.996 square meters situated at Gayatri enclave, Maqdumpally Road, Bhongir, Nalgonda District; hence, by way of the proposed amendment, the plaintiffs now intend to add the said properties also to the present partition suit to avoid multiplicity of proceedings and for proper and effective adjudication of the suit. One of the contentions of the defendants is that the suit properties are acquired by the 1st respondent with her own earnings and the same are not liable for partition and that the plaintiffs filed the suit in an improper form and that the suit is not maintainable; the other

contention is that the application seeking amendment of the plaint was filed at a belated stage.

10. Before proceeding further, it is necessary to refer to the provision of law viz., proviso to Order VI Rule 17 of the Code, which reads as under:

“Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial.”

11. It is profitable to refer to the legal position.

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

“In the given facts, there is a clear lack of “due diligence” and the mistake committed certainly does not come within the preview of a typographical error. The term “typographical error” is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore, the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. As a consequence the plea of typographical error cannot be entertained in this regard since the situation is of lack of due diligence wherein such amendment is impliedly barred under the Code.”

In *Rajkumar Gurawara (dead) through LRs v. S.K.Sarwagi and Company Private Limited and another*², the Supreme Court having referred to Order VI Rule 17 of the Code had held as follows:

“Further, it is relevant to point out that in the original suit, the plaintiff prayed for declaration of his exclusive right to do mining operations and to use and sell the suit schedule property and in the petition filed during the course of the arguments, he prayed for recovery of possession and damages from the second defendant. It is settled law that the grant of application for amendment be subject to certain conditions, namely, (i) when the nature of it is

¹ (2012) Supreme Court Cases 300

² (2008) 1 SCC 364

changed by permitting amendment; (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party; (iii) when allowing amendment application defeats the law of limitation.”

In the decision in VIDYABAI V/s. PADMALATHA³, the Supreme Court observed that proviso to Order VI Rule 17 of the Code is couched in a mandatory form and, therefore, the court’s jurisdiction to allow an application for amendment is taken away there under unless the conditions precedent therefor are satisfied, and that before allowing amendment, the Court must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial and that it is the primary duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties and only if such a condition is fulfilled, the amendment is to be allowed. Thus, the proviso appended to Order VI Rule 17 of the Code was held to restrict the power of the Court and that it placed an embargo on exercise of its jurisdiction and that unless the jurisdictional fact as envisaged therein is found to exist, the court would have no jurisdiction at all to allow the amendment.

In REVAJEETU BUILDERS V/s NARAYANA SWAMY⁴, on an analysis of English and Indian case law, the Supreme Court carved out the following principles which should weigh with the Court while dealing with an application for amendment:

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) Whether the application for amendment is *bona fide* or *mala fide*;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and

³ (2009) 2 Supreme Court Cases 409

⁴ (2009) 10 SCC 84

- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

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

In CHANDER KANTA BANSAL V/s. RAJINDER SINGH⁵, the Supreme Court, taking note of the fact that 'due diligence' has not been defined in the Code, referred to the dictionary meaning of 'diligence' which is to the effect that it means careful and persistent application or effort or a continual effort to accomplish something; care; caution; the attention and care required from a person in a given situation, and observed that 'due diligence' means the diligence reasonably expected from and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation. Reference was also made to 'Words and Phrases' by Drain-Dyspnea (Permanent Edition 13-A) wherein 'due diligence' was defined in law to mean doing everything reasonable and not everything possible. The Hon'ble Supreme Court, therefore, concluded that 'due diligence' would mean reasonable diligence and would mean such diligence as a prudent man would exercise in the conduct of his own affairs.

Further, in the decision in Abdul Rehman and Another v. Mohd. Ruldu and Others⁶, the Supreme Court, having taken note of the above provision of law had laid down that it is clear that the parties to the suit are permitted to bring forward amendment of the pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them and that the Courts have to be liberal in accepting the same, if such application for amendment is made prior to the commencement of the trial and that if such application is made after the commencement of the trial, in that event, the

⁵ (2008) 5 SCC 117

⁶ 2013(1)ALD 1(SC)

Court has to arrive at a conclusion that, inspite of due diligence, the party could not have raised the matter before the commencement of the trial. In the above decision the Supreme Court reiterated the following proposition:

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

In the above decision the Hon'ble Supreme Court further referred to the ratio in the decision in Pankaja and another v. Yellapa⁷, which runs as follows:

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

In Pankaja and another (6 supra) the facts are as under: “As per the case of the plaintiffs, the defendant, in violation of the Court order, had further encroached into the suit property. Therefore, the plaintiffs sought for the amendment of the plaint for seeking the reliefs of declaration of ownership and possession of the said encroached area also. The said application was allowed by the trial Court. However, the Principal Civil Judge rejected the application for amendment on the ground that the application for amendment was filed at a belated stage. The High Court dismissed the revision on the said ground and also on the ground that the amendment introduces a different relief than what was originally asked for. The Supreme Court permitted the amendment by allowing the appeals.

In Sampath Kumar v. Ayyakannu and another⁸ the facts and ratio are as under: “A suit was brought in the year 1988 for perpetual injunction in respect of an agricultural land. Before the commencement of the trial in the year 1999, the plaintiff moved the application for amendment of the plaint alleging that during the pendency of the suit, the defendant had forcibly disposed the plaintiff in the year 1989. On such averments the plaintiff sought

⁷ AIR 2004 SC 4102

⁸ (2002) 7 SCC 559

for the relief of declaration of title to the suit property and consequential relief of recovery of possession. The defendant opposed the application of the plaintiff stating that he had perfected title to the property by adverse possession and that the suit is barred by law of limitation and that a valuable right that had accrued to the defendant is being sought to be taken away by proposed the amendment. The trial Court rejected the application for amendment observing that the appropriate course for the plaintiff was to bring a new suit. The High Court maintained the said order. The Supreme Court while allowing the appeal of the plaintiff had referred to its earlier decisions and had finally held as follows:

8. In Rukhmabai v. Lala Laxminaraya and Ors.: AIR 1960 SC 335, this Court has taken the view that where a suit was filed without seeking an appropriate relief, it is a well settled rule of practice not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.

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

10. An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observations in Siddalingamma and Anr. v. Mamtha Shenoy: (2001) 8 SCC 561.

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

In *Usha Devi v. Rijwan Ahamd*⁹ a contention was advanced that the trial of the suit would commence with the settlement of the issues; and, in support of the said contention that the framing of issues marked the commencement of the trial of the suit reliance was placed on the decision in *Ajendraprasadji N.Pandey v. Swami Keshavprakeshdasji* [(2006) 12 SCC1]. However, while meeting the said contention, the attention of the Supreme Court was invited to the decision of the Supreme Court in *Baldev Singh v. Manohar Singh* [(2006) 6 SCC 498] wherein it was held as follows:

“Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial Court. That apart, commencement of trial as used in proviso to Order VI Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing

⁹ (2008) 3 Supreme Court Cases 717

of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order VI Rule 17 CPC which confers wide power and unfettered discretion on the Court to allow an amendment of the written statement at any stage of the proceedings.

Further, the Supreme Court having referred to a three-judge Bench decision in *Sajjan Kumar v. Ram Kishan*¹⁰, had held as follows:

“Having heard the learned Counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial Court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial Court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the Plaintiff-Appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit.”

Thus in *Usha Devi's* case (*Supra*), the Supreme Court, keeping in view of the decision in *Sajjan Kumar* (*supra*), held as follows:

“We may clarify here that in this order we do not venture to make any pronouncement on the larger issue as to the stage that would mark the commencement of trial of a suit but we simply find that the appeal in hand is closer on facts to the decision in *Sajjan Kumar* and following that decision the prayer for amendment in the present appeal should also be allowed.”

In the case on hand also, the affidavit in lieu of examination-in-chief of PW1 has already been filed and the suit is coming for cross examination of PW1. Therefore, in the well considered view of this Court, the facts of the present case are akin to the facts of the cases in the decisions in *Usha Devi*, *Baldev Singh* and *Sajjan Kumar* (*supra*). Therefore, the contention, in the

¹⁰ (2005) 13 SCC 89

counter of the defendants that the belated request of the plaintiffs for amendment of the plaint cannot be permitted, is devoid of merit.

12. On the analysis of the contentions and case facts, this Court finds that there is acceptable merit in the contentions of the plaintiffs and that there are no impediments for allowing the amendment and that therefore the request of the plaintiffs for amendment of plaint for addition of schedules 'G' and 'H' to the plaint schedule merits consideration. This Court is of the considered view that it would be a sound exercise of discretion to permit the amendment of the plaint schedule and that on the ground of mere delay, amendment cannot be refused. Since the dominant purpose of the Rule is to minimize the litigation and to enable the parties to have all the issues relating to one dispute resolved in one suit, the amendment sought for by the plaintiffs can be allowed, in the considered view of this Court. As rightly pointed out, the question whether the plaintiffs would be entitled to succeed cannot be prejudged while considering the instant application, filed for amendment of the plaint. The amendment, even if permitted at this belated stage, helps in setting at rest the dispute between the parties once and for all. Further, if granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed and the Court has also to consider whether the proposed amendment is intended to determine the real dispute between the parties. No right accrued to the defendants would get defeated if the proposed amendment is allowed as the 1st defendant is from the beginning stating that the properties are her self acquired properties and are not liable for partition. Further, in view of the facts and the ratios in the decisions, which are squarely applicable to the facts of the case, this Court is of the considered view that the order refusing the amendment of plaint is not justified and that therefore, the order of the Court below dismissing the petition seeking amendment of the plaint brooks interference.

13. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, I.A.No.463 of 2011 in O.S.No.390 of 2008 on the file of the Court of the learned III Additional District Judge, Ranga Reddy District, at L.B.Nagar, is allowed. The trial Court shall now permit the petitioners/plaintiffs to carry out the amendments to the plaint and plaint schedule and file a neat copy of the plaint and thereafter give the defendants an opportunity to file a written statement, if any, if they wish to do so.

There shall be no order as to costs.

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

24th November, 2016
RAR



M. SEETHARAMA MURTI, J

