

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

-
Civil Revision Petition No.5752 of 2011

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India by the unsuccessful petitioner/plaintiff is directed against the order dated 28.11.2011 of the learned Junior Civil Judge, Huzurnagar of Nalgonda District passed in I.A.no.390 of 2011 in O.S.No.50 of 2009 filed under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908 requesting to permit the plaintiff to amend the plaint as detailed in the affidavit and the petition list.

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

3. The case of the plaintiff in support of the request for amendment of the plaint, as stated in the affidavit and as per the submissions made before this Court, in brief, is as follows:

The plaintiff had filed the suit for perpetual injunction. She is the absolute owner in exclusive possession of the suit schedule property. The defendant has no right whatsoever of any nature over the subject property. In the cause title of the plaint, the age of the plaintiff was wrongly shown as 65 years, while in fact, she was aged about 52 years at the time of institution of the suit. Though all the material facts are pleaded in the plaint, they require certain clarification, as such clarification is absent in the plaint pleadings. In the plaint, it is pleaded that the property was gifted to the plaintiff by her father-in-law late Hanumaiah under a simple gift deed. The said fact requires clarification with regard to handing over of possession of the property that was gifted to her. In the plaint, she had pleaded that she had constructed a

residential house therein and the same was mutated in her name in the records of the Gram Panchayat. The said pleading also requires further clarification such as furnishing of details as to the door number of the property and the nature of possession. Hence, the following amendments are to be incorporated in the plaint.

“i. In description of the plaintiff para to delete the letters ‘65’ and to substitute the same with letters ‘52’.

ii. In para no.3 of the plaint at line 8 after the words Procs.No.D/1386/92, dated 03.03.1992 the following sentences are to be added

“on the day of gift, i.e., on 17.10.1986 itself the donor late Palvai Hanumaiah handed over the possession of the property gifted to the plaintiff”.

iii. In page 2 line 1 after the words and enjoyment of the said property, the words “by raising” in the same sentence are to be deleted and to add the following sentence.

“Later, the plaintiff got dug a well therein and raised”.

iv. In page 2 line 2 of the words residence house therein to add the following sentence.

“In a phased manner covered with iron and asbestos sheets and given the entire suit premises on lease to a iron scrap dealer and the tenant of the plaintiff is residing in the suit premises, carrying on his iron scrap business.”

And after the words ‘without any interruption and’ to add the words ‘to’

v. In page 2 line 3 after the words including the defendant to add the following sentence:

‘Thus, the plaintiff is in continuous possession and enjoyment of entire suit premises openly, un-interruptedly and to the knowledge of all including the defendant herein’.

vi. In page 2 line 5 after the word property, to add the following sentence:

“By assessing the structures got constructed by the plaintiff to property tax and assigned door number as 1-102”.

vii. In page 2 line 6 after the words from time to time, to add the following sentence:

“since the year 1992-1993”

viii. In page 2 line 7 at the end of the said para, to add the following sentences:

“The originals of the said documents are not readily available with the plaintiff and they will be filed at the time of trial of the suit. It is submitted that the plaintiff came into possession of vacant site under suit property on 17.10.1986, later got dug a well therein and got constructed a structures therein, the said structures were assessed to tax by Grampanchayath,

Huzurnagar, and though the defendant has got knowledge about simple gift deed dated : 17.10.1986 executed by late Palvai Hanumaiah in favour of this plaintiff, and though the plaintiff got dug well and got constructed structures in the suit site and though the structures in the suit were assessed to property tax by Grampanchayath, Huzurnagar, the defendant, at any stage had not protested, not objected to, and not initiated any legal steps since 17.10.1986 against this plaintiff. Thus, the plaintiff perfected her title to suit property to adverse possession.”

(Reproduced verbatim)

The amendments as proposed are necessary for the purpose of determining the real questions in controversy between the parties to the suit. The amendment as proposed, if permitted, does not change the pleadings already urged; but, the proposed amendment only clarifies the pleadings already urged in the plaint. The trial in the suit has not yet commenced. As such, no prejudice would be caused if the amendments as sought for are permitted. The Court is having ample powers to permit the amendment.

4. The case of the defendant, in the counter and as per the submissions made at the time of hearing, in brief, is as follows:

The plaintiff has no manner of right over the plaint schedule property. The plaint allegations are denied by filing a written statement in the suit. The allegations in the affidavit of the plaintiff that the plaint pleadings originally urged in the plaint require clarification in regard to her age, handing over of possession under simple gift deed to her, construction of residential house and the assignment of door number to the residential house and the nature of possession are all false. Under the guise of the proposed amendment, the plaintiff wants to introduce new facts and change her original pleadings. If the pleadings stated in the proposed amendment are material pleadings, she ought to have urged the said pleadings in the original plaint. Now, she wants to say that she made constructions with iron and asbestos sheets and had given the entire suit premises on lease to an iron scrap dealer and that the said tenant is residing in the suit premises and is carrying on his iron scrap business. The said pleading is totally a new pleading. As per the pleading in the proposed amendment, it is clear that she is out of possession. The suit

itself is not maintainable. The plaintiff also wants to introduce a pleading in the plaint by way of the proposed amendment that she has perfected title to the suit property by adverse possession. The proposed amendment is intended to make a new case under the guise of explaining the original pleadings. She cannot be permitted to plead a new case, which is inconsistent with her original case. The petition is intended to drag on the proceedings. The contention that the amendment proposed, if permitted, will not prejudice the case of the defendant is denied. If the amendment is permitted, the defendant would be put to serious loss.

5. On merits, the trial Court had dismissed the application for amendment filed by the plaintiff *inter alia* holding that the amendment, if permitted would constitute a new case and change the cause of action altogether.

6. At the hearing, the learned counsel for the plaintiff while reiterating the case of the plaintiff, which is already stated *supra*, would submit as follows: "The pleading in the proposed amendment are elucidatory in nature and such amendments intended to clarify the original pleadings are permissible under facts and in law. The parties to the suit shall be 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. The Court below erred in disallowing the amendment which is intended to clarify the original pleadings." Per contra, the learned counsel for the defendant while reiterating the defence pleaded and supporting the orders of the Court below had submitted that under the guise of the proposed amendment, the plaintiff wants to introduce new facts and change her original pleadings and that the said proposed pleading is totally a new pleading and that the plaintiff now wants to introduce a pleading in the plaint by way of the proposed amendment that she has perfected title to the suit property by adverse possession and that the proposed amendment is intended to make a new case under the guise of explaining the original pleadings and that she cannot be permitted to plead a new case, which is inconsistent with her original case

and that the amendment if permitted causes prejudice to the defendant. Since the issues are already framed and as the trial had commenced, the plaintiff is debarred from seeking the amendment in view of the bar under the proviso to Order VI Rule 17 of the Code.”

7. I have given detailed and thoughtful consideration to the facts and the submissions and the cases of the parties, which are extracted supra, in detail.

8. In the case on hand, in view of the contention that since the issues are framed, it shall be deemed that the trial has commenced; and that therefore, the plaintiff is precluded from seeking amendment in view of proviso of Order VI Rule 17 of the Code and that the plaintiff had failed to plead and establish that she could not seek this amendment earlier in spite of due diligence, it is appropriate to refer to the legal position.

9. Before proceeding further, it is necessary to first refer to the proviso to Order VI Rule 17 of the Code, which reads as under:

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

In the decision in **VIDYABAI V/s. PADMALATHA**^[1] the Supreme Court observed that the proviso to Order VI Rule 17 of the Code is couched in a mandatory form and, therefore, the court’s jurisdiction to allow an application for amendment is taken away there under unless the conditions precedent therefor are satisfied, and that before allowing amendment, the Court must come to a conclusion that in spite of due diligence the parties could not have raised the matter before the commencement of the trial and that it is the primary duty of the Court to decide as to whether such an amendment is necessary to decide the real dispute between the parties and only if such a condition is fulfilled, the amendment is to be allowed. Thus, the proviso appended to Order VI Rule 17 of the Code was held to restrict the power of the Court and that it placed an embargo on exercise of its jurisdiction and that

unless the jurisdictional fact as envisaged therein is found to exist, the court would have no jurisdiction at all to allow the amendment. In **REVAJEETU BUILDERS V/s NARAYANA SWAMY**^[2], on an analysis of English and Indian case law, the Hon'ble 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 bonafide or malafide;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

The Supreme Court, however, clarified that the above principles were illustrative and not exhaustive. In **CHANDER KANTA BANSAL V/s. RAJINDER SINGH**^[3], 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.

10. On the aspect that the application for amendment is not debarred in view of the proviso to Order 6 Rule 17, reliance was placed on the decision in **Usha Devi v. Rijwan Ahamd**^[4]. In the said decision, 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 trial of the suit. Reliance was placed upon 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 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing 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 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.”

However, the Supreme Court having referred to a three-judge Bench decision in **Sajjan Kumar v. Ram Kishan**^[5], 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, 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.”

11. Coming to the case on hand, it is trite to mention that the facts of the case on hand are akin to the facts of the cases in **Usha Devi and Sajjan Kumar** (supra). Therefore, in the well-considered view of this Court, the bar under the proviso to Order 6 Rule 17 of the Code is not applicable to the case on hand.

12. Further, in the decision in **Abdul Rehman and Another v. Mohd.**

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

reiterated the following proposition:

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

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

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

13. Reverting to the instant case facts, the suit is filed for perpetual injunction. Insofar as the aspect in regard to mentioning the correct age of the plaintiff in place of the wrong age mentioned in the plaint, delivery of possession under a simple gift deed, which was already adverted to in the plaint and assignment of door number to the construction made, it appears from the examination of the original pleadings and the pleadings in the proposed amendment that the said amendments being sought for are elucidatory in nature, in the well considered view of this court, and therefore, can be permitted. Further, the proposed amendment in regard to the nature of construction also can be allowed as the case of the plaintiff is that she had made the construction. Further, the proposed amendment in regard to leasing out the premises to an iron scrap dealer and the possession of the property being with the said tenant and the further pleadings in regard to enjoyment of the property, which the plaintiff intends to add by way of the proposed amendment also can be permitted, in the well-considered view of this Court, as the suit is one for perpetual injunction, which is at the stage of trial in the court of first instance. Therefore, if the amendment is permitted as sought for after excluding one sentence in the proposed amendment viz.,

'Thus, the plaintiff had perfected her title to the suit property by adverse possession', the ends of justice would be met. Be it noted that for obtaining a perpetual injunction in a suit of this nature, the plaintiff has to establish her settled possession and need not establish adverse possession. Therefore, there is no necessity to permit the plaintiff to incorporate that particular pleading in the proposed amendment in the original pleadings by way of amendment. The defendant is totally denying the right, title and interest and also the possession of the plaintiff over the suit schedule property. In view of his said defence, if the amendment is permitted, no prejudice would be caused to him. Since the dominant purpose of the Rule is to minimize the litigation and to enable the parties to have all the issues relating to one dispute resolved in one suit, the amendment sought for by the plaintiff can be allowed, in the well-considered view of this Court. In order to avoid multiplicity of suits, it would be a sound exercise of discretion to permit the amendment being sought for in the pending suit. As per the precedential guidance, the well settled rule of practice is not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment, if the plaintiff seeks to do so. Further, as per settled legal position, if the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed. In so far as the delay, since the facts of the case are akin to the facts of the cases **Usha Devi and Sajjan Kumar** (supra) this Court is of the considered view that the proviso to Order VI Rule 17 of the Code is not a bar for allowing the amendment sought for by the plaintiff. Viewed thus, this Court finds that the plaintiff can be permitted to amend the plaint by incorporating all the proposed amendments as sought for in the petition list except the one sentence, viz., 'Thus, the plaintiff had perfected her title to the suit property by adverse possession'.

14. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, I.A.No.390 of 2011 is allowed in part permitting the plaintiff to amend the plaint as sought for in the petition list, however, excluding the sentence viz., 'Thus, the plaintiff had perfected her title to the suit property by adverse possession' from the proposed

amendment. It is needless to mention that the plaintiff shall carry out the amendments to the plaint and file a neat copy of the plaint, as per the directions in these orders before 15.06.2016. On such filing of the amended neat copy of the plaint, the defendant is at liberty to file an additional written statement to answer the averments introduced by way of the proposed amendment in the plaint.

There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

27th April, 2016
RAR

[\[1\]](#) (2009) 2 Supreme Court Cases 409

[\[2\]](#) (2009) 10 SCC 84

[\[3\]](#) (2008) 5 SCC 117

[\[4\]](#) (2008) 3 Supreme Court Cases 717

[\[5\]](#) (2005) 13 SCC 89

[\[6\]](#) 2013(1)ALD 1(SC)

[\[7\]](#) AIR 2004 SC 4102