

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No. 4281 of 2015

ORDER:

This Civil Revision Petition under Article 227 of the Constitution of India is filed by the unsuccessful plaintiff assailing the orders dated 24.08.2015 of the learned Principal Senior Civil Judge, Srikakulam, passed in I.A.No.698 of 2015 in O.S.No.245 of 2013 filed by the plaintiff under Order VI Rule 17 of Civil Procedure Code, 1908, read with Rule 28 of A. P. Civil Rules of Practice, 1908, requesting to accord permission to amend the plaint 'A' schedule and carry out consequential amendments to the plaint.

2. I have heard the submissions of *Sri T.Vinod Kumar*, learned counsel for the petitioner/plaintiff (hereinafter, 'plaintiff') and *Sri K.Murali Krishna*, learned counsel for the respondents/defendants 1 to 3 (hereinafter, 'defendants'). I have perused the material record.

3. The case of the plaintiff, in brief, is as follows:

The plaintiff is the daughter of the 1<sup>st</sup> defendant and late Gurugubelli Dalinaidu. The defendants 2 to 5 are also the children of the 1<sup>st</sup> defendant and said Dalinaidu. Thus, the defendants 2 to 5 are the brothers and sisters of the plaintiff. The said Dalinaidu has got landed property, tiled houses, kitchens, slabbed house and tin sheet shed besides two vacant sites, which are situated in Ragolu village. The plaintiff and the defendants are members of a joint family. The family has got landed properties, in the name of late Gurugubelli Dalinaidu, namely, Ac.5.76 cents in Kothavalasa village, Ac.1.53 cents in Togaram village, Ac.0.73 cents in Nimmatorlavada village and Ac.3.03 cents in Korlakota village in Amadalavalasa Mandal, Srikakulam District. The members of the family are enjoying the properties jointly. Gurugubelli Dalinaidu died on 18.01.2011 leaving behind him the plaintiff and the defendants 1 to 5 as his legal representatives. After the death of her father, the plaintiff requested

the defendants 1 and 2 for partition of the plaint schedule properties. But, the defendants 1 and 2 postponed the matter from time to time and did not come forward for partition of the properties. Having no other alternative, the plaintiff filed the instant suit for partition of plaint 'A', 'B', and 'C' schedule properties into 36 shares and allot  $7/36^{\text{th}}$  share to the plaintiff and  $1/36^{\text{th}}$  share to the 1<sup>st</sup> defendant and  $7/36^{\text{th}}$  share to the defendants 2 to 5 and for grant of mesne profits from the year 2011 onwards and costs. The plaintiff got mentioned the total extents of the properties in the 'A' schedule of the plaint. She did so due to her illiteracy. However, she subsequently obtained copies of No.3 adangals relating to the properties from the Tahasildar, Amadalavalasa, wherein the property details were mentioned. Hence, the plaintiff filed the application seeking amendment of the plaint 'A' schedule and permission to carry out consequential amendments to the plaint 'A' schedule. The proposed amendment, if permitted, does not change the extents of the items of the properties; and the form of the suit will not be altered. Hence, the amendment of the plaint as sought for and as mentioned in the petition list may be permitted.

4. The defendants filed a counter *inter alia* contending as follows: 'The application seeking amendment of the plaint 'A' schedule property filed at the belated stage, i.e., after the closure of the evidence on the side of the plaintiff is not maintainable. Even in the proposed amendments to the said schedule, the boundaries of the various itmes of the property are not mentioned. The survey numbers mentioned are not full survey numbers. The descriptive particulars of the lands are not correct. As the trial of the suit has already commenced, the present amendment petition without seeking permission and leave of the Court is not maintainable under law. The petition is devoid of merit and 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 defendants 1 to 4 had raised a specific contention that the plaintiff did not furnish the boundaries of the various items of plaint 'A' schedule properties and that the extents mentioned are not covered by full survey numbers and that in the schedule, even a channel was shown as liable for partition and that the plaintiff has not relied upon any copies of No.3 Adangals and did not examine the Tahasildar, who was said to have issued copies of the same, and that the proposed amendment without mentioning the boundaries of various extents of the properties will not be helpful in identifying the lands at the time of division of the properties and that even if the proposed amendment is to be considered, yet there will be ambiguity in the schedule and that as the trial has already commenced and the plaintiff did not assign adequate reasons, the plaintiff's application cannot be allowed.

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

7. The learned counsel for the plaintiff while reiterating the pleaded case of the plaintiff would submit that the plaintiff did not give the extents of each sub item of land due to her illiteracy and that she recently came to know about the extents and nature of land in each sub item when she obtained No.3 adangal copy from the Tahasildar, Amadalavalasa, and hence, it has become just and necessary to seek amendment of the plaint 'A' schedule to avoid further complications. *Per contra*, the learned counsel for the defendants would submit that the plaintiff had come forward with a belated application and that the proposed amendment changes the cause of action, nature of the schedule and adversely affects the defence of the defendants and causes

prejudice to them and that in view of the proviso to Order VI Rule 17 of the Code, the plaintiff who is not diligent is not entitled to seek amendment of the plaint since the trial of the suit had commenced. In reply, the learned counsel for the plaintiff would submit as follows: "For the ultimate cause of justice and to avoid further litigation and for the purpose of determining the real questions in controversy between the parties and to give quietus to the disputes once and for all and in one litigation it is just and necessary to permit the amendment. The proposed amendment does not change the cause of action or the nature of the suit. The plaintiff is only seeking amendment of the plaint 'A' schedule property as stated above; but, she is not seeking amendment of the boundaries of any sub item of the schedule; in fact, boundaries are not mentioned in the original schedule itself for the reason that extents are full extents. Further, the total extent of the property mentioned in each main item of the plaint 'A' schedule is not being altered by way of the proposed amendment and the amendment is being sought obviously to specify the extents of land in each sub-item of property and also to specify the nature of the land in each sub-item. The said mistake in regard to non-mentioning the said details was realized when she had obtained the copies of No.3 adangals from the Tahasildar, Amadalavalasa. The petition for amendment of the plaint schedule was filed immediately on realization of the mistake. The amendment, if permitted, would only clarify the details of the properties in the plaint 'A' schedule and would be helpful at the time of actual partition pursuant to the final decree, in case of ultimate success of the plaintiff in the suit."

8. I have perused the schedule 'A' annexed to the plaint and also the proposed schedule 'A' annexed to the petition list. Schedule 'A' of the original plaint consists of four items. In each time of the said original schedule, survey numbers of each sub-item are only mentioned; and instead of mentioning the extent of land of each sub-item, the total extent of the land in the entire item

was mentioned, however, stating the name of the Village, Mandal, registration sub-District and the District in respect of each item. Thus, the extent of land of each sub-item is not mentioned. The total extent of land in each item, viz., items Nos.1 to 4 in 'A' schedule was stated as Ac.5.76 cents, Ac.1.57 cents, Ac.0.70 cents and Ac.3.33 cents. That apart, a note is appended under each item of schedule 'A' to the effect that the extents are full extents, hence boundaries are not mentioned. However, by way of the proposed amendment, the plaintiff now intends to state the extent of each sub-item of land along with its nature, viz., wet or dry or a channel. The plaintiff further maintains that there is no need to mention the boundaries of each sub-item of property as the extents covered by each sub-item are full extents. One of the contentions of the contesting defendants is that the boundaries are not mentioned and that the details originally mentioned and the details now being sought to be mentioned by way of proposed amendment are not sufficient to identify the properties and that some of the properties are channels, which are not liable for partition, and therefore, the amendment cannot be permitted. According to the plaintiff, since the extents are full extents, boundaries need not be furnished. It is the further case of the plaintiff that the channels are private channels and that the matters either in regard to allotment of the extents covered by the channels or in regard to working out of rights with regard to sharing waters flowing through the channels for cultivation of the lands, are to be considered in the suit for partition while working out equities and considering the issue of equitable partition. On the analysis of the contentions and facts, this Court finds that there is acceptable merit in the contentions of the plaintiff and that there are no impediments for allowing the amendment. Be that as it may.

9. However, the learned counsel for the defendants also contended that the proposed amendment is being sought by the plaintiff after commencement of trial and that in view of the proviso to Order VI Rule 17 of the Code, the

plaintiff is debarred from seeking the proposed amendment since trial has commenced. 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.”*

10. In this backdrop of facts and contentions it is profitable to refer to the legal position.

In J.Samuel and others v. Gattu Mahesh and others<sup>1</sup> 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<sup>2</sup>, the Supreme Court having referred to Order VI Rule 17 of the Code had held as follows:

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

<sup>1</sup> (2012) Supreme Court Cases 300

<sup>2</sup> (2008) 1 SCC 364

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

In REVAJEETU BUILDERS V/s NARAYANA SWAMY<sup>4</sup>, on an analysis of English and Indian case law, the Supreme Court carved out the following principles which should weigh with the Court while dealing with an application for amendment:

- (1) Whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2) Whether the application for amendment is *bona fide* or *mala fide*;
- (3) The amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4) Refusing amendment would in fact lead to injustice or lead to multiple litigation;
- (5) Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and
- (6) As a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

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<sup>3</sup> (2009) 2 Supreme Court Cases 409

<sup>4</sup> (2009) 10 SCC 84

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

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

Further, in the decision in Abdul Rehman and Another v. Mohd. Ruldu and Others<sup>6</sup>, 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

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<sup>5</sup> (2008) 5 SCC 117

<sup>6</sup> 2013(1)ALD 1(SC)

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*<sup>7</sup>, 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 another*<sup>8</sup> the facts and ratio are as under: “A suit was brought in the year 1988 for perpetual injunction in respect of an agricultural land. Before the commencement of the trial in the year 1999, the plaintiff moved the application for amendment of the plaint alleging that during the pendency of the suit, the defendant had forcibly disposed the plaintiff in the year 1989. On such averments the plaintiff sought for the relief of declaration of title to the suit property and consequential

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<sup>7</sup> AIR 2004 SC 4102

<sup>8</sup> (2002) 7 SCC 559

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*<sup>9</sup> 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 of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are

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<sup>9</sup> (2008) 3 Supreme Court Cases 717

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*<sup>10</sup>, 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 suit is at the stage of cross-examination of DW1 and the trial has not yet concluded. 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 of the defendants is devoid of merit.

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<sup>10</sup> (2005) 13 SCC 89

10. This Court on facts found that the request of the plaintiff for amendment of plaint 'A' schedule to the extent being sought merits consideration. This Court is of the considered view that it would be a sound exercise of discretion to permit the amendment of 'A' schedule of the plaint and that on the ground of mere delay amendment cannot be refused. Since the dominant purpose of the Rule is to minimize the litigation and to enable the parties to have all the issues relating to one dispute resolved in one suit, the amendment sought for by the plaintiff can be allowed, in the considered view of this Court. As rightly pointed out, the question whether the plaintiff would be entitled to succeed cannot be prejudged while considering the instant application, filed for amendment of the plaint 'A' schedule. 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. 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 'A' schedule is not justified and that therefore, the orders of the Court below dismissing the petition seeking amendment of the plaint brooks interference.

11. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, I.A.No.698 of 2015 in O.S.No.245 of 2013 on the file of the Court of the learned Principal Senior Civil Judge, Srikakulam, is allowed. The trial Court shall permit the petitioner/plaintiff to carry out the amendment to plaint 'A' schedule and the plaint and file a neat copy of the plaint and thereafter give the defendants an opportunity to file an additional

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.

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M. SEETHARAMA MURTI, J

17<sup>th</sup> November, 2016  
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