

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.4874 of 2011

ORDER:

Heard both sides and perused the material on record. The impugned order is against dismissal of the leave sought for withdrawal of the present suit for mandatory injunction, with liberty to file fresh suit for declaration with consequential reliefs. The observation of the lower Court is the plaintiff can as well seek for amendment. In fact for seeking amendment what is required is due diligence from the date of noticing till the date of filing as the matter is almost at the fag end for the arguments, leave about the sufficiency of evidence or not brought on record. In fact, the expression of the apex Court in ***Sampath Kumar V. Ayyannu***^[1] while holding a suit for prohibitory injunction sought for amendment into declaration with consequential relief of possession, for trial not commenced amendment sought held, trial Court should have been liberally allowed for no bar to independent suit when sought to amend to avoid multiplicity of proceedings. Here the principle though applies the facts are different as in this case it is at fag end of trial and in the case before the Apex Court trial not commenced. It is not a case of the respondents in opposing to waive the proviso to Order VI Rule 17 of due diligence muchless the order of the Court to file and to permit which could not even unless other side waive. Having regard to the above the trial Court should have been permitted the withdrawal for fresh suit not a bar when sought for but for insisting for costs, if any.

2) In the result, the revision is allowed setting aside the order of the lower Court in I.A. No.682 of 2011 in O.S. No.1735 of 2006 and by allowing the I.A before the lower Court i.e., I.A. No.682 of 2011 of the suit by permitting withdrawal of the suit for mandatory injunction,

giving leave to file fresh suit for declaration needless to say fresh suit will not save any limitation nor take away the accrued rights of the other side. However, subject to costs of Rs.5,000/- for the leave to the set aside incurred in contesting the matter.

3) Miscellaneous petitions, if any pending in these two appeals shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 03-02-2016

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[\[1\]](#) 2002(9) SRJ 198