

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3442 of 2015

ORDER:

The unsuccessful petitioners, defendants 4, 7 and 8, filed this revision petition, under Article 227 of the Constitution of India, assailing the order dated 31.07.2015 of the learned Senior Civil Judge, Mangalagiri, Guntur District, passed in I.A.No.1562 of 2015 in O.S.No.344 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 written statement.

2. I have heard the submissions of *Sri G.Vijaya Babu*, learned counsel for the revision petitioners/ defendants 4, 7 and 8 (hereinafter, 'petitioners') and *Sri V.Sreenivasa Rao*, learned counsel for the respondent/ plaintiff (hereinafter, 'respondent'). I have perused the material record.

3. The basic facts, as per the submissions made by the learned counsel for the parties and as could be culled out from the material on record, in brief, are as follows:

The respondent/ plaintiff brought the suit against the defendants for partition of the plaint schedule properties into six equal shares by metes and bounds and for allotment of one such share to the respondent/ plaintiff. The suit which was instituted in the year 2007 on the file of the Court of the learned Principal Senior Civil Judge, Guntur, is transferred to the present Court at Mangalagiri, Guntur District, and was re-numbered as O.S.No.344 of 2008. When the suit is coming for adducing evidence on the side of the defendants, the subject application is filed by the petitioners for amendment of their written statement.

4. In support of the said request, the petitioners stated that after affidavit in lieu of examination-in-chief of DW1 was filed and when the matter is coming

up for cross-examination of DW1 it came to light during the course of the discussions with their counsel that jugglery has happened in noting the names of the 4<sup>th</sup> defendant and his father in paragraph (5) of the written statement and therefore, the necessity has arisen for seeking the amendment for correcting the mistake that has crept in line numbers 15 and 16 of paragraph (5) and that the mistake could not be noticed earlier despite due diligence and that if the mistake is allowed to continue without rectification, it would affect the defence in the suit wherein title to the property of the parties is involved and that if the amendment is permitted, the defence will not be altered and that the mistake had occasioned not due to intentional and wanton reasons, and that the 4<sup>th</sup> defendant is an agriculturist and is an illiterate and rustic person and that therefore, despite due diligence, the mistake was not noticed earlier.

5. Though no counter is filed by the respondent, the petition was orally resisted before the trial Court.

6. The trial Court by a cryptic order dismissed the petition. In the impugned order, it is stated that there are no reasons assigned by the petitioners as to why the application is to be allowed and that it finds no merit or *bona fide* reasons in the affidavit filed in support of the petition and that the amendment will adversely affect the basic structure of the written statement and hence, such an amendment cannot be allowed.

7. Aggrieved thereof, the petitioners filed this revision petition.

8. The learned counsel for the petitioners would contend that the original pleading and the proposed amendment, if examined in juxtaposition, it is very clear that the mistake is purely accidental. He would submit that in the 9<sup>th</sup> line in page No.(3) from top the father's name Appaiah was mentioned instead of mentioning '4<sup>th</sup> defendant' and that in the 11<sup>th</sup> line from the top of the said

page '4<sup>th</sup> defendant' was mentioned instead of mentioning 'her father Appaiah' in that place and that the said mistake had happened due to jugglery and oversight and that the findings of the trial Court are erroneous for the reason that the amendment sought for, if permitted, does not change the basic structure of the written statement as was held by it and would not cause any prejudice to the plaintiff. He would further submit that the Court has wide power to grant amendment of written statement as permitting the amendment of written statement stands on a different footing than that of permitting the amendment of a plaint and that in a case of this nature, where the petitioners were able to show that they could not seek amendment earlier inspite of due diligence, the amendment sought ought to have been allowed.

9. *Per contra*, the learned counsel for the plaintiff would submit that what is stated in the written statement has been reiterated in the affidavit of DW1 filed in lieu of examination in chief and that later, he was cross examined and that the amendment of written statement cannot be permitted in view of the fact that what has been pleaded in the written statement was already reiterated in the evidence and that, therefore, the amendment even if permitted is not going to be of any avail to the petitioners and that the amendment that is being sought after the trial has commenced and made progress cannot be permitted and that the application seeking amendment is barred in view of the proviso under Order VI Rule 17 of the Code.

10. I have carefully gone through the pleadings and the impugned orders of the Court below. I have bestowed my attention to the facts and submissions.

11. The first contention of the respondent is that application for amendment of the written statement is filed at the stage of cross-examination of DW1 and that, therefore, the defendants are debarred from seeking amendment in view of the proviso appended to Order VI Rule 17 of the Code.

12. Before proceeding further, it is necessary to refer to the proviso to Order VI Rule 17 of the Code 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 this backdrop of facts and contentions it is profitable to refer to the legal position.

In *Rajkumar Gurawara (dead) through LRs v. S.K.Sarwagi and Company Private Limited and another*<sup>1</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 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>2</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

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

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

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>3</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.

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

In CHANDER KANTA BANSAL V/s. RAJINDER SINGH<sup>4</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

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<sup>3</sup> (2009) 10 SCC 84

<sup>4</sup> (2008) 5 SCC 117

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>5</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 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>6</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

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<sup>5</sup> 2013(1)ALD 1(SC)

<sup>6</sup> AIR 2004 SC 4102

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>7</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 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

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

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>8</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 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 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>9</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

<sup>8</sup> (2008) 3 Supreme Court Cases 717

<sup>9</sup> (2005) 13 SCC 89

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 plaintiff is devoid of merit.

In Andhra Bank v. ABN Amro Bank N V and others<sup>10</sup> it was held that it is well settled that delay is no ground for refusal of prayer for amendment and that it is permissible in law to permit to amend the written statement and allow an additional ground of defence to be taken.

In Basavan Jaggu Dhobi v. Sukhanandan Ramdas Chaudhary<sup>11</sup> it is held to the effect that it is open to the defendant to take even contrary stands or contradictory stands and that thereby cause of action is not in any manner affected and that the issue of cause of action being affected will apply only to a case of a plaint being amended for introducing a new cause of action.

In Usha Balashaheb Swami and others v. Kiran Appaso Swami and others<sup>12</sup> it is held that it is well settled principle that a prayer for amendment

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<sup>10</sup> (2007) 6 SCC 167

<sup>11</sup> 1995 Supp (3) SCC 179

<sup>12</sup> (2007) 5 SCC 602

of the plaint and a prayer for amendment of written statement stand on different footings and that the general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of the claim applies to amendments to plaint and it has no counter part in the principles relating to amendment of written statement and that, therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

13. Reverting to the facts of the instant case, it is to be noted that the proposed amendments, as stated in the petition list, read as under:

“ Proposed Amendments:

In line No.16 of para No.5 of the written statement the words “her father Appaiah” may be substituted with the word “4<sup>th</sup> defendant”.

In line No.18 of para No.5 of the written statement the words “the 4<sup>th</sup> defendant” may be substituted with the word “her father Appaiah”.

(Reproduced verbatim)

A plain reading of the proposed amendment itself would indicate that the amendment sought is obviously intended to correct a mistake and that the amendment if permitted will not alter the defence much less detrimental to the interests of the plaintiff. Even though the cross-examination of DW1 is over, since the application is filed after the filing of the affidavit in lieu of examination-in-chief after noticing the mistake while having discussions with the counsel, as rightly contended by the learned counsel for the petitioners, the petitioners can always recall DW1 and clarify the position, if the proposed amendment is permitted. Further, if the proposed amendment is permitted, the trial Court would be in an advantageous position to examine the issues involved in the suit in proper perspective after duly considering the defence which the petitioners really intend to advance in the case. The said course

helps the trial Court to come to a just decision after considering the true import of the defence of the defendants 4, 7 and 8. Therefore, this Court is of the considered view that it would be a sound exercise of discretion to permit the amendment of written statement 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 defendants can be allowed, in the considered view of this Court. As rightly pointed out, the question whether the defendants would be entitled to succeed on the proposed defence now being introduced by way of the proposed amendment cannot be prejudged while considering the instant application, filed for amendment of the written statement. 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 subserves 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 plaintiff would get defeated, if the proposed amendment is allowed. Further, as per the ratios in the decisions, the defendants by way of an amendment to the written statement can be permitted to add a new ground of defence or substitute or alter a defence or take an inconsistent plea and the same is not objectionable. 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 permitting the amendment of written statement is justified and that therefore, the orders of the Court below dismissing the petition seeking amendment brooks interference.

14. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, I.A.No.1562 of 2015 in OS No.344 of 2008 on the file of the Court of the learned Senior Civil Judge, Mangalagiri, is

allowed. The trial Court shall permit the petitioners/ defendants 4, 7 and 8 to carry out the amendment and file a neat copy of the written statement and thereafter give the plaintiff an opportunity to file a rejoinder, if any, if the plaintiff wishes to do so. There shall be no order as to costs.

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

M. SEETHARAMA MURTI, J

27<sup>th</sup> October, 2016  
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