

*** THE HON'BLE SRI JUSTICE A.V.SESHA SAI**

+ CIVIL REVISION PETITION No. 3210 of 2011

% Dated: 14.03.2016

#Molli Eswara Rao, S/o. Nookalayya,
Aged 39 years, Hindu, Cultivation,
r/o. Jaithavaram (V) in
Chidikada (M), Visakhapatnam District.

..... Petitioner

AND

\$ Kurcha Chandra Rao, S/o. Appalanaidu,
Aged 38 years, Hindu, Cultivation and Employee,
R/o. Jaithavaram (V), Chidikada (M),
Visakhapatnam District.

..... Respondent

! Counsel for petitioner : Sri G. Rama Gopal

^Counsel for Respondent : N.A.

<GIST :

>HEAD NOTE :

? Cases referred :

1. AIR 2008 SUPREME COURT 1960

THE HON'BLE SRI JUSTICE A.V.SESHA SAI

CIVIL REVISION PETITION No. 3210 of 2011

ORDER:

This revision filed by the defendant in O.S.No.35 of 2007 on the file of the Court of Principal Junior Civil Judge, Chodavaram, challenges the order dated 13.07.2011, allowing I.A.No.273 of 2011 in O.S.No.35 of 2007 filed by the plaintiff/respondent herein under the provisions of Order VI Rule 17 of the Code of Civil Procedure (for short 'C.P.C').

Heard Sri G. Rama Gopal, learned counsel for the petitioner. Despite service of notice, none appears for the respondent.

The respondent herein instituted O.S.No.35 of 2007 for specific performance of an agreement of sale alleged to have been executed by the petitioner. In the said suit, the respondent filed the present Interlocutory Application under Order VI Rule 17 C.P.C., seeking amendment of the description of the plaint schedule property by way of insertion of Survey Number and Patta Number. The learned Judge allowed the said amendment by way of the order impugned in the instant revision.

It is contended by the learned counsel for the petitioner that the order impugned is erroneous, contrary to law and opposed to the very spirit and object of the provisions of Order VI Rule 17 C.P.C; that in view of the prohibition contained under proviso to Order VI Rule 17 C.P.C., the present application is not maintainable after commencement of trial in the absence of due diligence on the part of the plaintiff; the judgment of the Hon'ble Apex Court in the case of ***Puran Ram v. Bhaguram***^[1] is not applicable in the facts and circumstances of the case.

In the above background, now the issue that emanates for consideration of this Court is:

“Whether the order under challenge, in the facts and

circumstances of the case, is sustainable and tenable and whether the same is in accordance with the provisions of Order VI Rule 17 C.P.C?”

Admittedly, the respondent herein filed the present application after commencement of trial and according to proviso to Order VI Rule 17 C.P.C., it is incumbent and obligatory on the part of the person applying to show that despite exercising due diligence, such application could not be filed before commencement of trial. In the affidavit filed in support of the application, this Court does not find any such foundation laid by the respondent in the said direction and in the absence of compliance of such a statutory mandate, the application filed by the respondent cannot be maintained.

Another significant aspect, which needs to be noted, is that the Court below for holding in favour of the plaintiff/respondent herein, placed reliance on the judgment of the Hon’ble Apex Court in the case of ***Puran Ram v. Bhaguram***.

According to the learned counsel for the petitioner, the said judgment of the Hon’ble Apex Court is not applicable to the facts and circumstances of the instant case. In the said pronouncement, the Hon’ble Apex Court while dealing with the provisions of Section 26 of the Specific Relief Act, 1963 (for short ‘the Act’) held in favour of maintainability of such applications for amendment of schedule. In this context, it may be apt to reproduce the relevant paragraphs of the said judgment, which read thus:

“10. Keeping the arguments advanced by the learned counsel for the parties in mind, let us now consider whether the prayer for amendment of the plaint and the agreement, in the facts and circumstances of the case, could be allowed or not. So far as the prayer for correcting or rectifying the agreement in respect of a part of the description of the suit property is concerned, it would be appropriate to look into the provisions made in [Section 26](#) of the Specific Relief Act, 1963. Chapter 3 of the [Specific Relief Act](#), 1963 specifically deals with rectification of instruments. [Section 26](#) provides as to when an instrument may be rectified and reads as under: -

"26. When instrument may be rectified. (1) When, through fraud or a mutual mistake of the parties, a contract or other

instrument in writing (not being the articles of association of a company to which the [Companies Act](#), 1956, applies) does not express their real intention, then-

(a) either party or his representative in interest may institute a suit to have the instrument rectified; or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified; or

(c) a defendant in any such suit as is referred to in clause (b), may, in addition to any other defence open to him, ask for rectification of the instrument.

(2) If, in any suit in which a contract or other instrument is sought to be rectified under sub-section (1), the court finds that the instrument, through fraud or mistake, does not express the real intention of the parties, the court may, in its discretion, direct rectification of the instrument so as to express that intention, so far as this can be done without prejudice to rights acquired by third persons in good faith and for value.

(3) A contract in writing may first be rectified, and then if the party claiming rectification has so prayed in his pleading and the court thinks fit, may be specifically enforced.

(4) No relief for the rectification of an instrument shall be granted to any party under this section unless it has been specifically claimed;

Provided that where a party has not claimed any such relief in his pleading, the court shall, at any stage of the proceeding, allow him to amend the pleading on such terms as may be just for including such claim."

11. After closely examining the provisions made under [Section 26](#) of the Specific Relief Act, 1963, we do not find any difficulty to hold that in a suit for specific performance of contract for sale, it is permissible to amend a part of the description of the suit property not only in the plaint but also in the agreement. [Section 26](#) clearly says as to when a contract or other instrument can be rectified and provides that when through fraud or a mutual mistake of the parties, the agreement in writing does not express their real intention, it is open to the parties to apply for amendment of the instrument. It provides that when such a situation arises, then-

(a) either party or his representative in interest may institute a suit to have the instrument rectified, or

(b) the plaintiff may, in any suit in which any right arising under the instrument is in issue, claim in his pleading that the instrument be rectified.

12. A reading of these two conditions made under [Section 26](#) of the Act would amply show that either party may institute a suit to have the instrument rectified or a party who has already filed a suit in which any right arising under the

instrument is in issue may claim in his pleading that the instrument be rectified. So far as the facts of the present case are concerned, it cannot be doubted that the main issue in the suit for specific performance of the contract for sale was relating to the agreement for sale in which a part of the description of the suit property was wrongly given by mutual mistake and therefore, needed to be amended. [Section 26](#), of course, says that it would be open to a party to institute a suit for correcting the description of the suit property, but the proviso to [Section 26](#) clearly permits that where a party has not claimed any such relief in his pleading, the court shall at any stage of the proceeding allow him to amend the plaint on such terms as may be just for including such claim. From a plain reading of the provisions under [Section 26](#) of the Act, there is no reason why the prayer for amendment of the agreement to correct a part of the description of the suit property from Chak No. 3 SSM to Chak No. 3 SLM, later on converted to Chak No. 3 SWM could not be granted. In our view, it is only a correction or rectification of a part of the description of the suit property, which cannot involve either the question of limitation or the change of nature of suit. In our view, the suit shall remain a suit for specific performance of the contract for sale and a separate independent suit is not needed to be filed when the proviso to [Section 26](#) itself clearly permits either party to correct or rectify the description of the suit property not only in the plaint but also in the agreement itself. So far as the question of limitation is concerned, the agreement was entered into on 12th of April, 1991 and the suit, admittedly, was filed within the period of limitation. Therefore, even if the amendment of plaint or agreement is allowed, that will relate back to the filing of the suit which was filed within the period of limitation. So far as the submission of the learned counsel for the respondent that the rectification of the agreement cannot be permitted is concerned, we are of the view that [Section 26\(4\)](#) of the Act only says that no relief for rectification of instrument shall be granted unless it is specifically claimed. However, proviso to [Section 26](#), as noted herein earlier, makes it clear that when such relief has not been claimed specifically, the court shall at any stage of the proceeding allow such party to amend the pleading as may be thought fit and proper to include such claim. Therefore, we are not in agreement with the learned counsel for the respondent that [section 26](#) would stand in the way of allowing the application for amendment of the agreement. The views expressed by us find support in a decision of the Madras High Court in Raipur Manufacturing Co., Ltd Vs. Joolaganti Venkatasubba Rao Veerasamy & Co [AIR 1921 Mad 664], wherein it was held that where in the course of a suit for damages for breach of contract, the plaintiff contends that there is a clerical error in the document embodying the contract, it is not always necessary that a separate suit should have been brought for rectification of the document

and it is open to the court in a proper case to allow the plaintiff to amend the plaint and ask for the necessary rectification. As noted herein earlier, the learned counsel for the respondent contended before us that the appellant could not get specific performance of the contract for sale unless he sued for rectification of the agreement for sale. We are unable to accept this contention of the learned counsel for the respondent for the simple reason that in this case, by filing the application for amendment in the suit for specific performance of the contract for sale, the appellant had sought the rectification of the agreement also. It is sufficient to observe that it was not necessary for the appellant to file a separate suit for that purpose as contended by the learned counsel for the respondent. It is open to the appellant to claim the relief of rectification of the instrument in the instant suit. The amendment, in our view, in the agreement was a formal one and there was no reason why such amendment could not be allowed.

13. The other ground on which the High Court has refused to permit the appellant to amend the plaint is that if the amendment is allowed, the suit shall be converted into a suit for declaration. We are unable to accept this view of the High Court. In our view, the suit is a suit for specific performance of the contract for sale simplicitor and only a part of the description of the suit property in the agreement as well as in the plaint was sought to be corrected or amended by the appellant by filing the application for amendment of the plaint. If we are permitted to look into the description of the suit property from the original plaint as well as from the application for amendment, it would be clear that the description of the suit property has been kept intact excepting that instead of Chak No. 3 SSM, Chak No. 3 SLM, later on converted to Chak No. 3 SWM, has been sought to be replaced. Therefore, it is difficult to conceive that by such amendment, that is, instead of Chak No.3 SSM, if Chak No.3 SLM, later on converted to SWM is substituted, either the description of the suit property or the nature of the suit would change. This is only a change in a part of the description of the suit property, which was wrongly described by mutual mistake. Therefore, in our view, this change in a part of the description of the suit property in the plaint cannot convert the suit for specific performance of the contract to a suit for declaration. In any view of the matter, the relief claimed in the suit remained the same i.e. a decree for specific performance of the contract for sale and by amendment, no declaration has been sought for in respect of the instrument.”

It is to be noted that in the instant case, the amendment was sought only with regard to the description of the schedule of the property in the plaint, but not the description of the property in the suit agreement

of sale in the light of the provisions of Section 26 of the Specific Relief Act. It is also to be noted that even for maintaining such application for amendment of description of property in the schedule of agreement, the contingencies as stipulated under Section 26 of the Act shall exist. In the instant case, the above circumstances and the contingencies are conspicuously absent. Therefore, the Court below grossly erred in applying the principles laid down by the Hon'ble Apex Court in the judgment referred to above. Therefore, this Court has absolutely no scintilla of hesitation to hold that the order under challenge cannot be sustained in the eye of law.

For the aforesaid reasons, the Civil Revision Petition is allowed, setting aside the order dated 13.07.2011 passed by the Principal Junior Civil Judge, Chodavaram, in I.A.No.273 of 2011 in O.S.No.35 of 2007. Consequently, I.A.No.273 of 2011 is dismissed. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date: 14.03.2016
va

Note:
LR Copy to be marked
B/o.
va/GRK

[\[1\]](#) AIR 2008 SUPREME COURT 1960