

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.2369 of 2015

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, by the unsuccessful petitioners-plaintiffs is directed against the order dated 11.06.2015 of the learned III Additional Senior Civil Judge, Vijayawada, passed in IA.no.174 of 2015 in OS.no.835 of 2011 filed under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908, ('the Code', for brevity) and Rules 28 and 29 of the Civil Rules of Practice, 1980, requesting to permit to amend the plaint as stated in the affidavit and petition list.

2. I have heard the submissions of the learned counsel for the revision petitioners-plaintiffs and the learned counsel for the respondent-defendant. I have perused the material record.

3. The parties shall hereinafter be referred to as the plaintiffs and the defendant for convenience and clarity.

4. The facts which are necessary to be stated as a prelude to this order, in brief, are as follows:-

'The plaintiffs 1 to 3 brought the suit against the sole defendant for ejectment of the defendant from the plaint schedule premises and recovery of vacant possession of the same and also for recovery of arrears of rent at the rate of Rs.4,600/- per month for the period from 01.07.2010 to 28.02.2011 and damages at the rate of Rs.10,000/- per month for the subsequent period i.e., from 01.03.2011 till the date of delivery of vacant possession and for costs. The defendant filed a written statement resisting the suit. During the pendency of the suit, the plaintiffs filed the subject application for amendment of the plaint. The same was resisted by the defendant. No oral and

documentary evidence was adduced at the hearing before the trial Court. On merits and by the orders impugned in this revision, the trial Court dismissed the petition of the plaintiffs. Therefore the plaintiffs are before this Court.'

5. The case of the plaintiffs 1 and 2, as stated by their GPA holder, 3rd plaintiff, in brief, is this:

'The 3rd plaintiff/deponent of the affidavit filed in support of the petition is the GPA holder of the plaintiffs 1 and 2. The plaintiffs 1 and 2 executed a GPA-cum-sale agreement in his favour. The plaintiffs 1 and 2 are the absolute owners of the plaint schedule property. He got issued the quit notice on behalf of the plaintiffs 1 and 2. For the said reasons he was shown as the 3rd plaintiff in the suit. In the plaint it is averred that the plaintiffs are absolute owners of the plaint schedule property and that the plaintiffs got issued the quit notice to the defendant though the plaintiffs 1 and 2 are the absolute owners of the property and the 3rd plaintiff is their GPA holder. The said averments were made by mistake. The GPA holder of the plaintiffs 1 and 2, the 3rd plaintiff, on behalf of the plaintiffs 1 and 2, in the rejoinder, which was issued to the reply notice issued by the defendant, denied the alleged lease deed but the following facts that 'the said lease deed was not acted upon by the parties and the said lease deed was nominal and was executed for the purposes of sales tax, vat tax etcetera at the request of the defendant formally; but actually the defendant paid rents up to 30.06.2010 at the rate of Rs.4,600/- per month as agreed to by him originally' were not properly mentioned in the plaint by mistake and oversight. There is no negligence or wilful omission on the part of the plaintiffs in not pleading the said aspects correctly in the plaint. Hence, it has become necessary to seek amendments of the plaint on the above stated aspects and as stated in the affidavit and petition list. Hence, the subject application is filed.'

6. Per contra, apart from denial of the allegations made in the affidavit of 3rd plaintiff-cum-the GPA holder of the plaintiffs 1 and 2, the case of the defendant in his counter, in brief, is this:

All the averments of the plaint when read harmoniously, it would appear that the plaintiffs are the owners of the plaint schedule property. In various paragraphs of the plaint, it is mentioned that all the three plaintiffs are in joint possession and enjoyment and are receiving the rents. The version of the plaintiffs that the plaintiffs 1 and 2 are the owners of the plaint schedule property is incorrect. The plaintiffs 1 and 2 executed registered sale agreement-cum-GPA in favour of the 3rd plaintiff and it is marked as exhibit A1. The 3rd plaintiff also filed an interlocutory application to receive certain documents. This defendant objected for receiving the documents by filing a counter. The 3rd plaintiff is an educated person and comes from an educated family. His father and brother are advocates. He is also an advocate and his sister is a Judicial Officer. The 3rd plaintiff knows all the facts. As such he mentioned the facts correctly in the original plaint. The present amendment petition is not maintainable. The suit is at the stage of cross-examination of PW1 after the documents were already exhibited; the amendment being sought at that stage is barred in view of the *proviso* to Order VI Rule 17 of the Code. The amendment being belatedly sought after the commencement of trial cannot be permitted. The written statement was filed in June, 2012 and after lapse of nearly four years, the present application for amendment was filed. In the present petition, the 3rd plaintiff styled himself as a GPA holder of plaintiffs 1 and 2 and the said fact is not mentioned in the original pleadings of the plaint. The plaintiffs want to now change the entire plaint averments. If such amendment as sought for by the plaintiffs is permitted, it would cause prejudice to the defendant. Therefore, and as per settled legal position, the amendment being sought cannot be permitted. If the amendment is permitted the entire structure of the suit as well as the cause of action would change.

7. At the hearing, the learned counsel for the plaintiffs would submit as follows: “As per settled legal position, the amendment is permissible as any amendment which avoids multiplicity of litigation and which is required to do complete justice is permissible. The proposed amendment does not alter the nature of the suit and cause of action. In the cause titles as well as in the body of the plaint, the averments were mistakenly made and to correct the said mistakes the proposed amendment is being sought. The plaintiffs 1 and 2 are the absolute owners and the 3rd plaintiff is their power of attorney holder. As such he is shown as 3rd plaintiff to the suit. But in the plaint, averments were made as if he is also owner of the plaint schedule property along with plaintiffs 1 and 2. Further, in the rejoinder notice there was a mention about the lease deed and that it is nominal document formally executed for the purpose of sales tax/vat tax etcetera and that in-fact the defendant paid rents upto a particular period. Though the said aspects were mentioned in the rejoinder, the same were not mentioned in the plaint. Therefore, the amendment, which is sought, is only to elaborate the pleadings and hence it does not change the structure of the suit.’

8. Per contra, learned counsel for the defendant while reiterating the submissions in the counter supported the orders of the Court below and placed reliance on the following decisions:

- i) Rajkumar Gurawara v. S.K.Sarwagi¹; and
- ii) Buragapu Meenakshi v. Satya Panigrahi and another²

9. I have given detailed and earnest consideration to the facts and submissions. I have carefully perused the plaint and also the pleadings of the parties in the present Interlocutory Application. The pleadings of the parties are already stated supra, in detail.

¹ (2008) 1 Supreme Court Cases 364

² MANU/AP/0241/2014

10. In view of the contention that after commencement of the trial, the amendment cannot be permitted in view of the proviso to Order VI Rule 17 of the Code, it is profitable to refer to the said proviso, 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 in spite of due diligence, the party could not have raised the matter before the commencement of trial.”

It is also profitable to refer to the legal position obtaining.

10.1 In *Rajkumar Gurawara (dead) through L.Rs v. S.Sarwagi and Company Private Limited and Another (supra)*, 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 *VIDYABAI V/s. PADMALATHA*³ 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

³ (2009) 2 Supreme Court Cases 409

envisaged therein is found to exist, the court would have no jurisdiction at all to allow the amendment.

In REVAJEETU BUILDERS V/s NARAYANA SWAMY⁴, 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 had, however, clarified that the above principles were illustrative and not exhaustive.

In CHANDER KANTA BANSAL V/s. RAJINDER SINGH⁵, 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 Supreme Court, therefore, concluded that 'due diligence' would mean reasonable diligence or such diligence as a prudent man would exercise in the conduct of his own affairs.

⁴ (2009) 10 SCC 84

⁵ (2008) 5 SCC 117

Further, 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 Supreme Court further referred to the ratio in the decision in *Pankaja and another v. Yellappa*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.”

In *Pankaja and another v. Yellappa* (D) by LRs and others (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

⁶ 2013(1)ALD 1(SC)

⁷ AIR 2004 SC 4102

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*⁸ 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 had moved the application for amendment of the plaint alleging that during the pendency of the suit, the defendant had forcibly dispossessed the plaintiff in the year 1989. On such averments, the plaintiff had sought for the relief of declaration of title to the suit property and consequential relief of recovery of possession. The defendant had 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 way of the proposed amendment. The trial Court had 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. *Rukhmabai v. Lala Laxminaraya and Ors.*: [1960]2SCR253, 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 of the 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

⁸ (2002) 7 SCC 559

plaintiff as amendment. 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 *Sddalingamma and Anr. v. Mamtha Shenoy*: AIR 2001 SC 2896).

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 *Buragapu Meenakshi* (2 supra) relied upon by the learned counsel for the respondent, in a suit for perpetual injunction with regard to plaint schedule property which is an Asbestos sheet roofed house with backyard, the plaintiff sought permission for amendment of the plaint to seek certain further reliefs like mandatory injunction to demolish the structure constructed in the vacant backyard site and for recovery of possession and other consequential amendments in the pleadings and the schedule, however, trial Court dismissed the said petition and this Court in the revision confirmed the orders of the trial

Court having come to a conclusion that the plaintiff who sought amendment of the plaint is not diligent and that the amendment which introduces a new case cannot be permitted after commencement of the trial.

10.2 In *Usha Devi v. Rijwan Ahamd*⁹, 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 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 found 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.”

Further, the Supreme Court having referred to a three-judge Bench decision in *Sajjan Kumar v. Ram Kishan*¹⁰, 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

⁹ (2008) 3 Supreme Court Cases 717

¹⁰ (2005) 13 SCC 89

High Court in exercise of its supervisory jurisdiction, even if Section 115 Code of Civil Procedure 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 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 instant case on hand also, the trial has not concluded and the stage of the suit is cross-examination of PW1. The matter has not reached the stage of arguments. Therefore, in the well considered view of this Court, the facts of present case are akin to the facts of the case in Usha Devi (supra) and Sajjan Kumar (supra). Hence, on the ground of delay, the amendment cannot be refused. Therefore, in the well considered view of this Court, the contention that the *proviso* to Order VI Rule 17 of the Code debars the plaintiffs from seeking the amendment is not well founded.

11. A plain perusal of the plaint and the present affidavit filed in support of the petition would show that in the original pleadings the 3rd plaintiff was shown as GPA holder of the plaintiffs 1 and 2. This fact is evident from the cause title. It is also the case of the plaintiffs 1 and 2 that they are the absolute owners of the plaint schedule property and they executed a GPA-cum-sale agreement in favour of the 3rd plaintiff and that he had issued the quit notice on their behalf and that therefore he was shown as 3rd plaintiff in the plaint. However, while making averments in the plaint it is stated that the

plaintiffs are the owners of the plaint schedule property instead of stating that the plaintiffs 1 and 2 are the owners of the plaint schedule property. Therefore, according to the plaintiffs, necessary amendment has to be carried out in the plaint to clarify that plaintiffs 1 and 2 are the owners of the plaint schedule property and that the 3rd plaintiff is their GPA holder. Further, according to the plaintiffs, paragraph 5(a) is also to be added after paragraph 5 in the original plaint to clarify about the lease deed dated 19.12.2008 about which a reference was made in the rejoinder notice of the plaintiffs. Apart from the contention that the amendment cannot be permitted in view of the proviso appended to Order VI Rule 17 of the Code, the other contention of the defendant is that if the amendment is permitted it changes the structure and cause of action and causes prejudice to the defendant. Since it is stated that the plaintiffs had already stated their case in their rejoinder and they are now seeking amendment to incorporate the same contentions and to elaborate the pleading already urged, the contentions of the defendant do not merit consideration. Even as per the precedential guidance in the decisions of the Supreme Court referred to supra, an amendment can be permitted if it is required for determining the real question in controversy between the parties and that all amendments, which are necessary for the purpose of determining the real questions in controversy between the parties, should be allowed if such amendments do not change the nature of the suit. An amendment can be permitted keeping in view larger interests of the parties. Further, if the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed. Therefore, the refusal of amendment, in the well considered view of this Court, leads only to multiplicity of litigation. As rightly pointed out, the merits of the pleadings stated in the proposed amendment cannot be adjudged while considering an interlocutory application filed for seeking amendment of the plaint. The Court has only to consider whether such amendment is necessary to decide the real

dispute between the parties. In the well considered view of this Court, if the amendment is permitted, though sought belatedly, would prevent multiplicity of litigation and also helps in determining the real question in controversy between the parties and in giving a quietus to the dispute once and for all. The law is well settled that the change of relief claimed or pleadings made to elaborate the existing pleadings by way of amendment neither would introduce a fundamental or constitutional change in the nature and character of the suit nor such amendment would change the frame of the suit. Since the amendment was necessitated on account of a mistake according to the plaintiffs and admittedly as the plaintiffs 1 to 3 are not the owners of the plaint schedule property and that the plaintiffs 1 and 2 alone are the owners of the plaint schedule property, it appears that the amendment is *bona fide* and that the refusal of amendment would lead to injustice and that on the other hand if the amendment is permitted no prejudice would be caused to the defendant as the defendant is from the beginning taking a consistent stand that the plaintiffs are not entitled to seek the reliefs against him as claimed in the suit. As per the ratios in the precedents the well settled rule of practice is not to dismiss the suit automatically but to allow the plaintiffs to make necessary amendment if the plaintiffs seek so to do. Therefore, for all the aforesaid reasons, granting of amendment of the plaint really sub-serves the ultimate cause of justice and avoids further litigation; hence, the petition filed for seeking amendment of the plaint deserves to be allowed.

12. Viewed thus, this Court finds that the impugned order refusing to permit the amendment on the ground that the amendment was sought for after the commencement of trial is unsustainable and brooks interference.

13. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, IA.no.174 of 2015 in OS.no.835 of 2011 is allowed. The trial Court shall now permit the plaintiffs to carry out the

amendment of the plaint and file a neat copy of the plaint. On filing of such neat copy of the plaint, the trial Court shall give the defendant an opportunity to file additional written statement to answer the averments in the amended plaint.

Miscellaneous petitions, if any, pending in this revision shall stand closed. There shall be no order as to costs.

M. SEETHARAMA MURTI, J

26.12.2016
Vjl

