

THE HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition No.3716 of 2014

ORDER:

Against the orders dated 07-10-2014 passed in dismissing the application filed in I.A.No.123 of 2014 that was filed by the revision petitioner under Order VI Rule 17 CPC for amendment of the plaint in O.S.No.778 of 2013, revision petition is maintained.

2. Coming to the relevant factual background, the revision petitioner is the plaintiff in O.S.No.778 of 2013 on the file of I Additional Junior Civil Judge, Vijayawada. The suit filed is for the relief of permanent injunction against the three defendants in respect of the plaint schedule property. Pending trial of the suit, application in I.A.123 of 2014 was filed by the plaintiff for amendment of plaint from the relief of permanent injunction to the relief of declaration of title with consequential injunction by seeking the proposed consequential amendment also to insert para 5-a of the plaint after para 5, two paras described and valuation at para 8 of the plaint for the relief portion to insert as Clause-(i) and in para 9 of the plaint to insert the relief portion as indicated in the petition with supporting affidavit.

3. The petition affidavit averments in nut shell for the proposed amendment sought for was that the defendants in the written statement claimed as not tenants but owners by denying the title of the plaintiff and by claiming that husband of defendant No.1 and father of defendants 2 and 3 was the absolute owner of the property and in peaceful possession and enjoyment by paying taxes and electricity charges. It is further averred in the written statement that for the above there was no mention about source of title much less possession on un-registered sale agreement dated 24-01-2003 said to have been executed by the husband of the plaintiff to his brother, none other than

the husband of defendant No.1 and father of the defendants 2 and 3 and in consequential thereto, a settlement deed dated 15-02-2004 was executed in favour of the husband of defendant No.1 by one Pothuraju Nirmala Jyothi and her son Venkateswhar Rao. Relying on the two documents in the said pleadings, evidence adduced, though the plaintiff is the absolute owner and those documents cannot prevail over her title pursuant to the patta issued in her favour by the Mandal Revenue Officer, Vijayawada on 24-10-1991 and her husband to execute the alleged agreement has no right over the property and that it is the plaintiff who constructed the two portions iron sheets house and let out one portion to the husband of defendant No.1 on monthly rent and without her knowledge, they caused mutation of the name of husband of defendant No.1 in municipal records and transferred electrical service connection in his name and in view of their dispute over the title of the plaintiff by setting-up the documents in evidence supra, it is necessitated to amend the plaint relief from permanent injunction to the relief of declaration. The application was resisted by the defendants in their counter saying there are no requisite grounds to consider the belated amendment and thereby, the petition is liable to be dismissed while specifically denying each and every averment of the petition affidavit. It is pursuant to which, by impugned order dated 07-10-2014, the lower Court dismissed the application with the observation that there is no due diligence as contemplated by proviso to Order VI Rule-17 C.P.C. after the amended CPC, 2002, it is pre-requisite to consider the proposed amendment, which is by setting up a new case and thereby, barred by virtue of proviso to consider. Impugning the same, the present revision is filed.

4. Heard both sides and perusal the material at length on record.

5. Now, the points that arise for consideration are:-

- (i) Whether the three impugned orders require interference by sitting in revision and if so, with what observations and what extent respectively?
- (ii) To what relief?

POINT No.1:

6. Before discussing facts further, it is needful to discuss scope of law on amendment of pleadings prior to and subsequent to the CPC amendments.

6.(a). Coming to the scope of Order VI Rule 17 CPC, prior to the amendment by Acts 46/99 & 22/2002, several expressions of the Constitutional Courts referring to and relying upon the pre-constitutional expressions of the privy council and several High courts and Courts of other countries laid down that even at the stage of second appeal amendment of pleadings can be allowed, if it is necessary to shorten the litigation or to decide real controversy between parties or to avoid future complications like in final decree proceedings or execution, provided that does not affect or prejudice the rights of the opposite parties, muchless changes the cause of action, for belated seeking is not a ground to reject, but for to award costs to compensate other side. Thus all amendments to be allowed satisfy two conditions: (a) of not working injustice to other side and (b) of being necessary for the purpose of determining the real questions in controversy between the parties.

6.(b). Coming to the scope of Order VI Rule 17 CPC, after amendment by Acts 46/99 & 22/2002, from several expressions of the Constitutional Courts, that liberal approach is curtailed to some extent by taking away

the right of parties to seek amendment, once trial is commenced, unless due diligence is shown.

6(c). For more clarity, the amended Order VI Rule 17 CPC, reads as follows:

“17. Amendment of Pleadings.- The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties:

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”

6(d). It is no doubt some liberal approach, without rigidity, is required to adopt from the wording, despite the proviso requires due diligence of the party seeking amendment once trial is commenced. However it no way takes away the power of the Court to satisfy from the material to consider such amendment despite trial commenced, with the earlier approach in all traits of resolving the real controversy to the lis, reducing life to the litigation, avoid multiplicity of proceedings and sub serving ends of justice, as procedural law is the hand maid and not mistress of justice and amendment of pleadings is part of the procedural law. This is for the purpose of preventing frivolous application to delay the proceedings as reiterated in Salem Advocate Bar Association, T.N V. Union of India¹ known as Salem Bar Association case-2.

6(e). Coming to delay in seeking amendment whether a ground by itself or deciding of real questions in controversy concerned, it is referring to some of the expressions among other of the Apex Court, in

¹ 2005(5) SCJ 519

Andhra Bank V. ABN Amro Bank N.V.² it was held by the Apex Court that, delay by itself is no ground for refusal of prayer for amendment, as the only question to be considered by Court is whether such amendment would be necessary for decision of the real controversy between the parties in suit and at that stage the Court cannot go into question of merit of amendment. Once trial commenced, amendment sought, to satisfy the requirement of due diligence. In *Surender Kumar Sharma V. Makhan Singh*³ the Apex Court observed that merely because the amendment sought is belated that does not liable to be rejected on the ground of delay, where Court feels allowing of the application resolves the real controversy between the parties. In *Pankaja V. Yellappa*⁴, *P.Durga Reddy and another v. B.Yadi Reddy*⁵ it was relying upon the expressions of the Apex Court in *State of AP v. Pioneer Builders*⁶ and *Sameer Suresh Gupta v. Rahul Kumar Agarwal*⁷ observed by this court that delay by itself is not a ground to reject the amendment when it can be allowed on other considerations, for the delay, other side can be compensated by costs.

6.(f). In *Vishwambhar v. Laxminarayan*⁸ it was held that if as a result of allowing the amendment, the basis of the suit is changed, such an amendment even though allowed, cannot relate back to the date of filing the suit to cure the defect of limitation. But in *L.C. Hanumanthappa (since died) rep by LRs Vs. H.B. Shivakumar*⁹ relying upon several expressions including by quoting with approval *Siddalingamma and Anr v. Mamtha Shenoy*¹⁰ it was held that the

² AIR 2007 SC 2511

³ 2009(10)SCC 626

⁴ AIR 2004 SC 4102

⁵ 2016 (2) ALT 63 = 2015(1) LS201.

⁶ 2007 (1) ALT 43 (SC)

⁷ (2013) 9 SCC 374

⁸ (2001) 6 SCC 163 at 168

⁹ 2016(1) SCC 332

¹⁰ (2001) 8 SCC 561

doctrine of relation back to date of suit would apply to all amendments made under Order VI Rule 17 of the Code of Civil Procedure, which generally governs amendment of pleadings, unless the court gives reasons to exclude the applicability of such doctrine in a given case and for no question of limitation was argued on the facts and costs can usually compensate for an amendment that is made belatedly.

6.(g). In *South Konkan Distilleries supra*, it was held further that whether claim is barred by limitation or not is a mixed question of fact and law, amendment cannot be rejected, but for to decide during trial on merits of that aspect. It was also held particularly at para-11 that Courts must be extremely liberal in granting prayer for amendment, if the court is of the view that if such amendment is not allowed, the party prayed for it shall suffer irreparable loss or injury or injustice.

6.(h). In *Prithi Pal Singh and Anr. v. Amrik Singh*¹¹ the Apex Court in the recent past in a suit claiming pre-emption, amendment of plaint sought claiming that plaintiff is entitled to relief as a co-sharer of the suit property, held that it is reasonable to presume that the amendment in the plaint would relate back to the date of filing the suit.

6.(i). In fact in *Sampath Kumar Vs. Ayyakannu*¹² application for amendment made 11 years after the date of the institution of the suit to convert through amendment a suit for permanent prohibitory injunction into a suit for declaration of title and recovery of possession was allowed holding, the basic structure of the suit is not altered by the proposed amendment and if it is permissible for the plaintiff to file an independent suit, why the same relief which could be prayed for in a new suit cannot be permitted to be incorporated in the pending suit by

¹¹ (2013) 9 SCC 576

¹² (2002) 7 SCC 559

allowing the amendment that would curtail multiplicity of legal proceedings.

6.(j). The Apex Court relying upon *M/s. Revajeetu Builders & Developers v. Narayanaswamy & Sons & others*¹³ held in *State of M.P. Vs. Union of India*¹⁴, *Ashutosh Chaturvedi V. Prano Devi*¹⁵ and *South Konkan Distilleries & Anr. V. Prabhakar Gajanan Naik*¹⁶ that though courts have ample power to allow amendment of plaint, said power should be exercised in the interest of justice and to determine the real questions in controversy between the parties and on such terms as may be just, amendment cannot be claimed as a matter of right and court should not also adopt a hyper technical approach but a liberal approach and by compensating other side by costs. It was also held by the Apex Court in *Ramachandra Sakharam Mahajan V. Damodar Trimbak Tanksale*¹⁷ that when the amendment sought for would enable the Court to pin-pointedly consider the real dispute between the parties and thereby help to render a decision more satisfactorily, it ought to be allowed.

6.(k). The Apex Court in *Vidyabai & Ors. v. Padmalatha*¹⁸, held further that it is the primal duty of the court to decide as to whether such an amendment is necessary to decide the real dispute between the parties. Only if such a condition is fulfilled, the amendment is to be allowed. The three important factors to be taken into consideration while considering the application for amendment are:

1. Whether the amendment sought for is necessary in determining the real controversy of dispute between the parties?
2. Whether the application for amendment is bona fide?

¹³ 2009 (10) SCC 84=AIR 2009 SC (Supp) 2897

¹⁴ 2011 (12) SCC 268

¹⁵ 2008 (15) SCC 610

¹⁶ AIR 2009 SC 1177

¹⁷ (2007)6 SCC 737

¹⁸ AIR 2009 SC 1433

3. Whether the amendment sought for, if allowed, causes prejudice to the other side which cannot be compensated adequately in terms of money?

6(l). This Court by scanning and updating the entire case law in the latest expression, vide common order dated 17.10.2016, in the Civil Revision Petition Nos.1751, 1752 and 1753 of 2016, held by reiterating the settled law- that amendment of pleadings is basically for the purpose of bringing about final adjudication in a suit and to avoid multiplicity of proceedings. It is in the interest of justice that a suit shall be decided on all points of controversy and accordingly, it is needed that the party shall be allowed to alter or amend their pleadings during the pendency of the suit. There can be a situation where there is change of circumstances in the course of pendency of a proceeding and if a matter in issue arises upon such change of circumstances, then amendment becomes necessary. According to Order VI Rule 17 of the Code of Civil Procedure, 1908, the Court may allow the amendment at any stage of the proceedings and for such purpose it may impose conditions i.e. in the form of cost or any other condition. The Court has been given discretion in this regard and the mandatory guidelines upon the Court as well as upon the party seeking amendment is that they shall make only such amendments which are necessary for determination of real controversy between the parties to the suit.

7. Amendment of pleadings from the above is basically for the purpose of bringing about final adjudication in a lis and to avoid multiplicity of proceedings and shorten litigation and where it is necessary to determine the real controversy. It is in the interest of justice that a suit shall be decided on all points of controversy and accordingly, it is needed that the party shall be allowed to alter or amend their pleadings during the pendency of the suit. According to

Order VI Rule 17 of the Code of Civil Procedure, 1908, the Court may allow the amendment at any stage of the proceedings and for such purpose it may impose conditions i.e. in the form of costs or any other condition. The Court has been given discretion in this regard and the mandatory guidelines upon the Court as well as upon the party seeking amendment is that they shall make only such amendments which are necessary for determination of real controversy between the parties to the suit. At the same time, the *Proviso* to Order VI Rule 17 CPC, puts a mandate upon the Court not to allow such amendment after the trial has begun (i.e. if issues have been settled), if its finds that the party could have raised the pleadings by due diligence at an earlier point of time. However, the *Proviso* need not be given a very rigid effect in all cases as the same is subject to the discretion of the Court, for procedural law does not come in the way to determine real matters in controversy so to permit for rendering substantial justice between parties and to avoid multiplicity of proceedings and life to litigation and of anticipatory future complications. The main object of the legislation is to enable the Court to allow amendment at any stage and thereby delay itself is not a ground to refuse, but for not to permit where there is by such amendment changes cause of action or tantamounts to withdrawal clear admissions unexplained or amendment plea to introduce is mutually destructive or where claim is time barred and allowing it causes grave prejudice and injustice to rights accrued to other side than by refusal. Even alternative pleas are permissible and in case of plaintiff, to choose one to the other inconsistent, though defendant is entitled to take inconsistent pleas even as alternative defences. The purpose of the *Proviso* cannot thereby do away with the intent of the legislation. Thus, if an application for amendment of pleadings has been filed after

trial has begun, the Court will normally be tilted against the applicant, if it could be raised by due diligence at any earlier stage of proceedings. But in proper cases if the point to be amended is very essential to the suit, the Court may, in the interest of justice and equity, allow the amendment on such conditions as the Court deems fit and proper in the facts and circumstances of the particular case, including as to costs for non showing of due diligence and for delay and latches.

8. From above propositions on amendment of pleadings, coming back to the facts, the law is clearly settled that merely because the defendant denied the title of the plaintiff, suit for bare injunction no way to be held unsustainable but for still it sustains, if the plaintiff is able to establish the entitlement to the relief of injunction from showing possession with legal right and by showing defendant has no right to interfere. It is settled law further that in a suit for declaration or injunction based on title, the plaintiff has to succeed on own strength and not on weakness of defence and for the defendant mere denial of plaintiff's right and title and entitlement to injunction besides alleged possession is enough. However, the law is fairly settled that the burden is not static as in all civil matters, the proof of preponderance of probabilities and no strict proof is required and once the plaintiff is able to establish his entitlement to the right of property and possession or for declaration, the burden shifts on the defendant to rebut said evidence and also to set-up any positive defence. From the above, the suit for bare injunction based on title even sought for amendment but one for declaration and consequential injunction or consequential possession but no way changes original cause of action, so also the proof in relation to the *lis* and the requirement of the nature of evidence but for the change in the scope of the *lis*, as any suit for bare injunction and title can be

incidentally gone into and in a suit for declaration of title can be effectively gone into. From this position of law, the question of bar of limitation to the relief from the proposed amendment also does not arise. Then coming to the delay and latches even taken from the defence in the written statement denying plaintiff's title, plaintiff could have been asked and non-asking by then and asking subsequently that itself is not a ground to reject the amendment sought for as per the settled expressions referred supra.

9. Now coming to requirement of due diligence as per the proviso to amended Order VI Rule-17 CPC, from the settled expressions re-setting the law existing prior to the amendment and a change from it no way takes the power of the Court, but for claiming as of a right by a party without showing due diligence and even from by not showing it, enables the Court to avoid multiplicity of proceedings or to shorten the litigation or unnecessary life to the litigation and also from the settled law that whether it is necessary for a just decision and effective disposal of the lis. Thus, the lower Court went wrong in dismissing the application holding that there is no due diligence and thereby, the amendment sought for is barred by rider under proviso to Order VI Rule 17 C.P.C., though due diligence to be considered is with some what with liberal approach as per settled expressions supra, even and when the documents filed were to be looked into only during trial and there is no pleading in claiming the title by the defendants with reference to the documents and that is the due diligence in seeking the amendment therefrom. Even from the commencement of trial to consider as a subsequent event to the pleadings and commencement of trial that necessitated the amendment, the lower Court should have allowed but for at best by imposing costs in considering the amendment.

10. Having regard to the above and in the result, the revision petition is allowed by setting the order of the lower Court impugned herein in I.A. No.123 of 2014 in O.S.No.778 of 2013 and consequently allowing the same by permitting the amendment sought for, subject to payment of costs of Rs.4,000/- (Rupees Four thousand only) payable by the plaintiff to the defendants in the lower Court after receipt of order including in directing the plaintiff to carry out her amendment with consequential amendments and with right to the defendants to file any additional written statement and to re-formulate the issues by any addition of issues even and to recall any of the witnesses for any further examination if necessary besides permitting the further evidence and to proceed further according to law in deciding the /is.

11. Consequently, pending miscellaneous petitions, if any, shall stand closed.

Dt. 19.10.2016
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Dr. B. SIVA SANKARA RAO, J

