

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.133 of 2016

ORDER:

This Civil Revision Petition is filed challenging the order dated 23.09.2015 in I.A.No.1116 of 2015 in A.S.No.50 of 2012 of IV Additional District Judge, Kadapa.

2. The petitioner herein is defendant No.2 in O.S.No.2 of 2007 on the file of III Additional Junior Civil Judge, Kadapa, which was filed for permanent injunction and it was dismissed on 31.07.2012. Aggrieved by the same, the plaintiff preferred appeal in A.S.No.50 of 2012 on the file of IV Additional District Judge, Kadapa. During the pendency of appeal, the plaintiff filed I.A.No.1116 of 2015 under Order VI Rule 17 r/w Section 151 of Code of Civil Procedure for amendment of plaint to include the relief of declaration, which is originally sought for permanent injunction. The said petition was allowed by the lower appellate Court on 23.09.2015. Aggrieved by the same, the present revision is filed by defendant No.2.

3. The petition averments in nutshell are that the trial Court dismissed the suit holding that despite

defendants denied the plaintiff's title, he did not seek the relief of declaration and thereby pending appeal, the plaintiff is seeking the amendment.

4. Counter-affidavit is filed opposing the petition stating that in the year 2007 itself the suit was filed, where, in the written statement filed by defendants, particularly, defendant No.1 denied the title of the plaintiff so also possession and the amendment must have been sought within three years by virtue of Article 58 of the Limitation Act,1963. Now, seeking the amendment by the plaintiff with lapse of more than six years is barred by time.

5. The lower appellate Court allowed the application with the observations that the Courts got wide discretion as per the expression of this Court in **Desai Krishna Murthy v. Pinjari Moula Ali Sab(2014(3) ALD 639)** and after going through the record to decide the real controversy between the parties and the amendment no way changes cause of action much less causes prejudice to the defence of the defendants.

6. It is the contention of the learned counsel for the revision petitioner/2nd defendant that order of the lower appellate Court in allowing the application is not only contrary to the rigor of due diligence required by Order

VI Rule XVII amended C.P.C. of 2002 for the suit filed subsequent to amended provision from its application but also otherwise unsustainable and even title of the plaintiff is disputed by the written statement of the defendants way back, not sought for such relief with any due diligence immediately thereafter and it is only to avoid limitation/to maintain a separate suit the amendment now sought for, which could not have been allowed.

7. No doubt Article 58 of the Limitation Act, 1963 speaks relief of declaration not otherwise provided for the accrual of cause of action for the three years limitation is from the denial when the right to sue first accrues. It is a fact finding required whether mere denial is the commencement of accrual of starting point for limitation of three years under Article 58 from said written statement filed or when the attention of the plaintiff drawn to the written statement to count, subject to any covered propositions in this regard.

8. Whereas, it is the contention of the learned counsel for the plaintiff that merely because defendants denied the plaintiff's title, plaintiff need not seek for declaration but as an abundant caution it is sought for.

9. A perusal of the impugned order of the lower

Court, no way adverted to the aspect of the amendment, claim is barred by time or not and there is nothing even with reference to the said written statement plea and it is not even observed of plaintiff is not bound merely because defendant denied the plaintiff title, to amend prayer from bare injunction to declaration with consequential injunction. These aspects in fact are required to be adverted and are required to be decided with reference to the main appeal *lis* covered by the dismissal of the suit claim of the plaintiff since impugned. Thus, this Court feels it just to set aside the order allowing the application by directing the lower appellate Court to restore the petition to file and decide with the appeal. It is needless to say the petition if not ends in dismissal while deciding with appeal if necessary by remand of the matter following either Order 41 Rule 25 C.P.C. or Order 41 Rule 23 or 23-A or 24 r/w Section 107 C.P.C. as the case may be where such amendment allowed and further pleadings and evidence necessary. It is made clear that none of the observations will influence the mind of the trial Court in deciding the petition with main appeal, but for merits.

10. Accordingly and in the result, the Civil Revision Petition is disposed of, without prejudice to the rights and contentions of both parties by setting aside the

impugned order and by restoring the petition to file of IV Additional District Judge, Kadapa, to dispose of the petition in I.A.No.1116 of 2015 along with the main appeal on merits.

11. Miscellaneous petitions, pending if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:19-02-2016

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