THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.6033 of 2016

ORDER:

The unsuccessful plaintiffs-respondents 1 to 5 filed this Civil Revision Petition, under Article 227 of the Constitution of India, assailing the order, dated 04.07.2016, of the learned Junior Civil Judge, Mahabubnagar, passed in IA.no.416 of 2014 in OS.no.215 of 2006 filed by the 1st defendant-petitioner under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure, 1908, and Rule 28 of Civil Rules of Practice, requesting for permission to amend the written statement-cum-counter claim as stated in the petition list.

2. I have heard the submissions of Sri B. Mohan, learned counsel appearing for the revision petitioners-plaintiffs, and of Sri M. Atchyut Reddy, learned counsel appearing for the 1st respondent-1st defendant. I have perused the material record.

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

The plaintiffs brought the suit against the 1st defendant and the 2nd defendant, the Commissioner, Municipality, Mahabubnagar, for declaration that the plaintiffs are the owners of the plot bearing No.15 of an extent of 200 Square yards in Sy.no.102/E1, behind Government Headquarters hospital, Mhabubnagar, morefully described in the schedule annexed to the plaint; for recovery of possession of the same from the 1st defendant; mandatory injunction against the 1st defendant to pull down the structures raised by her in the suit plot; and, for costs. The 1st defendant having filed a written statement-cum-counter claim prayed for dismissal of the suit and sought the reliefs of declaration that she is the owner of the suit schedule property; and, a perpetual injunction restraining the plaintiffs, their family members and men etcetera from interfering with her possession of the same. During the pendency of the said suit, the 1st defendant filed the afore-stated application for amendment of the written statement-cum-counter claim. That application was resisted by the plaintiffs. On merits and by the orders impugned in this revision, the trial Court allowed the said petition of the 1st defendant on payment of costs of Rs.500-00 to the plaintiffs. Aggrieved thereby, the plaintiffs are before this Court.

4. Before proceeding further, it is necessary to refer to the pleadings of the parties.

4.1 The case of the 1st defendant, in brief, is this:

The plaintiffs brought the suit against her for declaration of title, recovery of possession and mandatory injunction for removal of the structures raised by her in the plaint schedule property. While resisting the suit she filed a written statement-cum-counter claim seeking the reliefs of declaration of ownership and perpetual injunction. Her specific contention is that M. Chinnaiah, the late husband of the 1st plaintiff and the father of the plaintiffs 2 to 5, sold an extent of 125 Square yards out of the suit premises bearing No.8-1-47, to her under a notarized document, dated 05.05.1997, for a total consideration of Rs.1,00,000/- and that he received the entire consideration and put her in possession of the said property and that he agreed to register a registered sale deed in her favour as and when demanded by her and that the said clause is also mentioned in the said document, which is already exhibited as exhibit B14 in the suit. However, in view of the denial of her right over the suit property by the plaintiffs, she was advised to make a counter claim and accordingly she made a counter claim in the suit to declare her title over the entire property as the deceased Chinnaiah had already executed registered instrument in respect of 75 square yards and executed private notarized document in respect of remaining 125 square yards after receiving the sale consideration in respect of the said extent sold to her. During the course of trial, she filed her affidavit in lieu of examination in chief, after the evidence on the side of the plaintiffs was closed. She is yet to be cross examined. While so, she changed her counsel and engaged a new counsel in the place of her former counsel. She has taken steps for further cross examination of PW1; and, PW1 was further cross examined on various aspects including exhibit B14. The said document was marked for a limited purpose, that is, collateral purpose. There is a specific recital in the said document that a registered sale deed would be executed by Chinnaiah as and when demanded by her. The said document was properly stamped and penalty was also paid. The plaintiffs are not parties to the said document in respect of 125 square yards of the property, which is part of the suit schedule property. However, they denied the said document. She was under the impression that the Court will give appropriate relief to her by moulding the relief in case of necessity and on proving the said document. She was advised that she ought to have sought an alternative relief of specific performance in respect of the said extent of 125 square yards. She did not seek alternative relief earlier as she was not advised so to do. She was under the *bona fide* belief that her title will be declared over the property covered by the notarized document even if it is treated as a sale deed and on proof of the contents of the said document. However, she was made to realize that based on the said document, exhibit B14, she ought to have sought an alternative relief for specific performance directing the plaintiffs to execute registered sale deed in her favour in case the main relief of declaration of title in respect of said 125 square yards is not to be granted. There is no wilful negligence on her part in not seeking the said relief earlier. Hence, she was advised to seek amendment of her written statement-cum-counter claim to seek the alternative relief apart from the main relief. In the said facts and circumstances, the petition is filed to incorporate paragraphs 5(a), 6 insofar as market value and court fee etcetera and paragraph (f) in the prayer portion of the written statement-cum-counter claim only to enable her to claim the relief of specific performance as an alternative relief to main relief of declaration of ownership. If the amendment is permitted there will not be any change of cause of action and no additional documents are required to be marked. The evidence already available on record in respect of the main relief is sufficient for even considering the granting of the alternative relief. By way of amendment, the 1st defendant is not setting up or introducing any new case. Since she is not pleading any new facts, the amendment sought is not a surprise to the plaintiffs. Taking advantage of the technicalities, that is, non registration of exhibit B14, the plaintiffs are trying to defeat her just claim. If the proposed amendment is not permitted and the main relief is refused to be granted on technicalities, particularly, on the ground that she did not seek specific performance, she would be put to serious loss. As she is prosecuting *bona fide* her counter claim, the amendment could not be sought before the commencement of trial. When she is preparing for cross examination it was realized that non-seeking of alternative relief of specific performance may be one of the legal lacunae in the case. No prejudice would be caused to the plaintiffs if the amendment of the written statement-cum-counter claim is permitted. On the other hand, if the amendment is not permitted, she would be put to irreparable loss and her rights in the immovable property will be affected.

4.2 Per contra, the case of the plaintiffs, as stated in the counter of the 1st plaintiff, in brief, is this:

The material allegations in the affidavit of the 1st defendant filed in support of the petition are all false. The suit is filed on 21.06.2006. On 27.10.2006, the 1st defendant filed her written statement-counter claim. The 1st plaintiff deposed as PW1. She was cross examined in part on 25.04.2012. Her cross examination was completed on 26.07.2012. Later, on 05.09.2012, the 1st defendant filed her affidavit in lieu of examination in chief. On 19.09.2012, the documents on her side were marked as exhibits B1 to B13. The matter was adjourned for determination of stamp duty on document, dated 05.05.1997. Later, stamp duty was paid on 20.09.2012. On 03.10.2012 the document was marked as exhibit B14 subject to objection. After one year and six months of the completion of the evidence on the side of the plaintiffs, the present application is filed. Earlier an application was filed to recall PW1 for further cross examination; and, that application was allowed and PW1 was further cross examined, on 18.09.2014. Now the suit is posted for cross examination of DW1. In the already filed written statement-cum-counter claim the 1st defendant pleaded that, on 05.05.1997, Chinnaiah sold out the house bearing no.8-1-47 constructed in an area of 125 Square yards in plot No.15 to her under a notarized affidavit for a sale consideration of Rs.1,00,000/- to meet his family necessities in the presence of one Vajram, M. Srinivas and M. Kumaraiah and that the said Chinnaiah having received the sale consideration put her in possession of the said house on the same day and that she paid consideration of Rs.1,00,000/- in the presence of the 1st plaintiff and that the 1st plaintiff knows very well about the sale transaction. The plaintiffs filed CRP.no.5161 of 2012 before this Court aggrieved of the docket orders, dated 20.09.2012, of the trial Court treating the document, dated 05.05.1997, as sale deed for collection of stamp duty. The said CRP was disposed of on 24.07.2013 with certain directions. This Court permitted to mark the said document subject to objection of the plaintiffs under the Indian Registration Act and to consider the said document only for collateral purpose and not for proving the terms thereof. The contention that the 1st defendant purchased 125 square yards out of the suit premises through notarized affidavit and that she was put in possession of the said property is false. The said document is a created document. It is marked subject to objection. The plaintiffs are not admitting and are denying the contents of exhibit B14. The

1st defendant earlier pleaded that exhibit B14 is an absolute sale deed though it is an affidavit. Now it cannot again be treated as an agreement of sale. The trial of the suit has already commenced. The main contention of the 1st defendant is that she changed her counsel and that the new counsel engaged by her advised her to amend the pleadings. The amendment if permitted goes to the root of the case and alters the cause of action for the counter claim. The 1st defendant in her written statement admitted that exhibit B14 is a private sale deed; but, after payment of stamp duty and after its consideration as a sale deed and after passing of the orders in CRP.no.5161 of 2012, she filed the present application pleading that the said document is an agreement of sale. It amounts to withdrawal of the earlier plea in the written statement. Hence, for all the above reasons, the amendment, which is being sought after eight years after the filing of the written statement-cum-counter claim, is not permissible. The declaration of title was sought in the counter claim treating exhibit B14 as a sale deed; and, by giving up such claim, the 1st defendant is trying to introduce a new case that it is an agreement of sale. Such new case would certainly affect the rights of the plaintiffs. The petition is liable to be dismissed.

4.3 Learned counsel for both the parties advanced arguments in line with the pleaded cases of the parties, which are stated supra, in detail.

5. To begin with, it is necessary to recapitulate certain core facts, which are as follows:

The plaintiffs brought the suit in respect of 200 Square yards of plot and sought the reliefs of declaration of ownership, recovery of possession and mandatory injunction. The 1st defendant while resisting the suit made a counter claim. In the written statement-cum-counter claim she pleaded that late Chinnaiah, the husband of the 1st plaintiff and the father of the plaintiffs 2 to 5, sold 75 square yards to her under a regular registered sale deed and that he also sold, under a notarized document(affidavit), that is, exhibit B14, the remaining extent of 125 square yards for a consideration of Rs.1,00,000/- and that he had already put her in possession of the said property having received the entire consideration. Thus, on the basis of the said two documents, she made a counter claim and sought the reliefs of declaration of title for the entire extent of 200 square yards besides the relief of perpetual injunction. After the evidence on the side of the plaintiffs was closed, she filed her affidavit in lieu of her examination in chief and marked all her documents in exhibit 'B' series. However, when exhibit B14 was tendered in evidence for being marked, an objection was raised as it is a notarized document (affidavit) and it is not registered. The required stamp duty and penalty on the said document are, however, paid. Therefore, there is no dispute with regard to the stamp duty and the penalty payable on the document. However, on the ground that the said document requires registration and is inadmissible in evidence for want of registration, an objection was raised by the plaintiffs for its marking. The trial Court, which collected the stamp duty and penalty on the said document by treating the same as a sale deed, permitted the said document to be marked as exhibit B14. While disposing of CRP.no.5161 of 2012 by orders, dated 24.07.2013, this Court noted that though the said document is styled as an affidavit, its contents are similar to a sale deed and that the document was treated as a sale deed by the trial Court and that stamp duty and penalty were also collected by the trial Court and that the nomenclature given to a document is not the criterion and that the contents of the document have to be seen in order to ascertain the true nature of the document and that since the defect in regard to deficiency or sufficiency of stamp duty is rectified the only objection that remained is in regard to non registration. Having noted so, this Court finally permitted the document to be marked subject to objection of the plaintiffs under the Indian Registration Act and directed the trial Court to consider the said document for only collateral purpose and not for proving the terms thereof.

6. In this background of facts and events, the 1st defendant now sought amendment of her written statement-cum-counter claim to claim the alternative relief of specific performance on the foundation of exhibit B14 and on the basis that there is a recital in the said document to the effect that Chinnaiah agreed to execute a registered document as and when demanded by the 1st defendant. Though the 1st defendant claimed declaration of title in respect of the entire extent on the basis of the said document and the registered document insofar as remaining extent, she now claims alternative relief of specific performance insofar as 125 Square yards covered by exhibit B14 as the said document is not a registered document. In support of the said request for amendment of the written statement-cum-counter claim to include the necessary pleading with regard to alternative relief of specific performance in respect of 125 square yards covered by exhibit B14, the 1st defendant contends that she was under the *bona fide* impression that on the basis of the documents her title will be declared; but, after change of advocate, she was advised that she ought to have claimed the alternative relief of specific performance in respect of 125 square yards covered by exhibit B14 and that, therefore, she filed the instant application for amendment of the written statement-cum-counter claim. The plaintiffs main contentions are that earlier the 1st defendant pleaded that the said document, exhibit B14, is a sale deed and that in fact the trial Court collected stamp duty and penalty and that this Court in the revision also noted that the trial Court treated the document as a sale deed and collected stamp duty and penalty and that the deficiency or sufficiency in regard to stamp duty is already rectified and that the only objection that remained to be considered is non registration of the document and that, therefore, this Court permitted the document to be marked for collateral purpose and not for consideration of the terms thereof

and, hence, the 1st defendant cannot now resile from the said stand and plead that the document is an agreement of sale and seek specific performance as an alternative relief.

7. It is not disputed before this Court that the said exhibit B14 contains recital to the effect that Chinnaiah agreed to execute a registered document as and when demanded by the 1st defendant. A plain perusal of the said document, exhibit B14, makes it manifest that the executant of the said document clearly stated that he undertakes to execute a registered sale deed as and when demanded without fail. Without making any further observations which may have a bearing on the merits of the matter, it is to be noted that it is for the trial Court, to interpret the recitals in the document, exhibit B14, at the appropriate stage, and come to a conclusion as to whether the said document can be considered as an agreement of sale or not. As already noted by this Court in the orders in the earlier revision and as also rightly observed by the trial Court, the nomenclature given to a document is not the criterion and the contents of the document have to be seen in order to ascertain the true nature of the transaction embodied in the document. There is also no dispute with the proposition that the nature/character and the description/nomenclature and also the stamp duty payable, if any, on the document have to be determined with reference to the recitals therein and the substance of the transaction embodied in the instrument and not with reference to the title, caption or nomenclature of the instrument. For classification of instruments, that is, to determine whether an instrument comes within a particular description in an Article to the Schedule to the Indian Stamp Act, the instrument should be read and construed as a whole. The nomenclature of or the caption given to the document is not determinative and the nature or the substance of the transaction contained in the document is only the determinative factor.

8. If the trial Court comes to the conclusion that it is an out and out sale deed then the natural legal consequences would follow. However, if the trial Court comes to the conclusion that it is an agreement of sale, then also the natural legal consequences would follow. The 1st defendant had already claimed the relief of declaration of title on the basis of exhibit B14. She is not now basing her claim on any other new oral and documentary evidence. Basing on the same exhibit B14 document she now intends to claim the alternative relief of specific performance by seeking amendment of her written statement-cum-counter claim. Since the main reliefs of declaration of title and perpetual injunction are already claimed, the alternative relief, in the considered view of this Court, if permitted, would meet the ends of justice and would not cause any prejudice to the plaintiffs as the alternative relief which is a lesser relief is also based on the same document, exhibit B14. Further, the law is fairly well settled that while considering an application for amendment of the pleadings, the merits of the case being introduced by way of an amendment cannot be prejudged. Whether the 1st defendant would be entitled to the alternative relief of specific performance or not has to be adjudicated after full fledged trial. In that view of the matter, this Court is of the considered view that the trial Court is justified in permitting the amendment of the written statement-cum-counter claim.

9. Before parting, it is also to be noted that the plaintiffs vehemently opposed the application of the 1st defendant before the trial Court on the ground that the amendment of the written statement-cum-counter claim was sought after the commencement of trial and that in view of the provision in the proviso appended to Order VI Rule 17 of the Code, the amendment cannot be permitted. Learned counsel for the plaintiffs while contending that the amendment is an after thought and that the amendment sought does not satisfy the condition of due diligence as prescribed in the proviso to Order VI

Rule 17 of the Code submitted that the trial Court was in error in allowing the amendment. Hence, it is necessary to refer to the legal position obtaining.

9.1 Before proceeding further, it is necessary to refer to the provision of law viz., proviso to Order VI Rule 17 of the Code, 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."

9.2 In Usha Devi v. Rijwan Ahamd[1] 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 VI 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 VI 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.

[1] (2008) 3 Supreme Court Cases 717

Further, the Supreme Court having referred to a three-judge Bench decision in Sajjan Kumar v. Ram Kishan[2], 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 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 trial has not yet concluded and the suit is coming for cross examination of DW1. 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 that the application seeking amendment of the written statement-cum-counter claim is barred under the proviso to Order VI Rule 17 of the Code is devoid of merit and needs no countenance.

9.3 In the decision in VIDYABAI V/s. PADMALATHA[3] the Supreme Court observed that the 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

---

[2] (2005) 13 SCC 89

[3] (2009) 2 Supreme Court Cases 409

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 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[4], 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 bonafide or malafide;
(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[5], 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

[4] (2009) 10 SCC 84
[5] (2008) 5 SCC 117

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 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[6], the Hon'ble 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 Hon'ble 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."

---

6 2013(1)ALD 1(SC)

In the above decision the Hon'ble Supreme Court further referred to the ratio in the decision in Pankaja and another v. Yellapa[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."

10. On a careful consideration of the facts, submissions and the legal position obtaining, this Court is satisfied that the Trial Court is justified in permitting the amendment of the written statement-cum-counter claim and that the well considered order of the trial Court brooks no interference.

11. In the result, the Civil Revision Petition is dismissed.

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

M.SEETHARAMA MURTI, J

07.04.2017
Vjl

[7] AIR 2004 SC 4102