

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

CIVIL REVISION PETITION No.4727 of 2016

ORDER:

The unsuccessful 1st defendant filed this revision petition, under Article 227 of the Constitution of India, assailing the order, dated 03.08.2016, of the learned Senior Civil Judge, Puttur, passed in IA.no.494 of 2016 in OS.no.40 of 2013 filed by the petitioners-plaintiffs under Order VI Rule 17 of the Code of Civil Procedure, 1908, ['the Code', for short] read with Rule 28 of Civil Rules of Practice, requesting for permission to amend the plaint as stated in the petition list.

2. I have heard the submissions of Sri V. Sudhakar Reddy, learned counsel appearing for the revision petitioner-1st defendant, and of Sri K.R. Srikant, learned counsel appearing for the respondents 1 & 2-plaintiffs. Respondents 3 to 5 are defendants 2 to 4 and they are stated to be not necessary parties. I have perused the material record.

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

The plaintiffs brought the suit against the defendants for partition of the plaint schedule properties into 24 equal shares by metes and bounds and to allot a separated 2/ 24th share each to the plaintiffs and for other reliefs. The 1st defendant alone is resisting the suit by filing a written statement. During the pendency of suit, the plaintiffs filed the afore-stated IA.No.494 of 2016 seeking amendment of the plaint. The 1st defendant resisted the said application. On merits and by the orders impugned in this revision, the trial Court allowed the said petition. Therefore, the 1st defendant is before this Court.

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

4.1 The case of the plaintiffs in support of the request for amendment of the plaint, in brief, is this:

The 1st plaintiff was examined as PW1. Afterwards, the evidence on the side of the plaintiffs is closed. 1st defendant was examined as DW1. During his cross examination, he admitted that under exhibit B4, Award No.18/ 2011-12, S.V. Puram, he received compensation amount of Rs.43,65,575/- from the Government of Andhra Pradesh in respect of the land in S.No.338 which is item no.6 of the plaint schedule property. DW1 also admitted that nearly Ac.4.00 cents of land stands in his name and also in the name of his wife and son. In the said properties also the plaintiffs are having a 2/ 24th share each. Hence, they are advised to include the award amount also as one of the properties liable for partition in the schedule of the plaint and seek amendment of the plaint for that purpose. Hence, it has become necessary to seek the amendment of the plaint by incorporating paragraph 9(a) and make necessary amendments in the valuation paragraph of the plaint and also the relief portion to enable the plaintiffs to seek a relief to direct the 1st defendant to pay their legitimate share of 2/ 24th each out of the compensation amount of Rs.43,65,575/- as afore-stated.

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

The material allegations in the affidavit filed in support of the petition of the plaintiffs are all false. No explanation is offered by the plaintiffs for filing the petition at the belated stage. The reasons stated by the plaintiffs for filing the petition at the advanced stage of the trial of the suit are unbelievable. The petition is not maintainable. When the suit is at the stage

of further evidence of the defendants, the present petition is filed. Therefore, it is not maintainable in view of the legal position obtaining. Now the plaintiffs are seeking amendment of the plaint and plaint schedule stating that the 1st defendant has received a compensation amount of Rs.40 lakhs and interest thereon in a sum of Rs.3,65,575/- from the Land Acquisition officials. National Highway Authorities actually acquired a part of the land of this defendant and paid compensation thereafter to this defendant; and, in the acquired land a road was formed. The plaintiffs' case is that they are in joint possession and enjoyment of the plaint schedule property. If the plaint averments and the proposed amendment are to be considered, it is obvious that their contentions are not correct. The proposed amendment changes the nature of the case. Hence, the amendment cannot be permitted. The plaintiffs have not filed sufficient proof to show that this defendant received the said amount with interest in respect of the land acquired for laying road by the National Highway Authority. The petition is filed with a *mala fide* intention. If the proposed amendment and consequential amendment are permitted, the same changes the nature of the case and the reliefs and it causes prejudice to the defendant.

5. At the hearing, learned counsel for both the sides made submissions in line with the respective pleaded cases of the parties.

6. I have given earnest consideration to the facts and submissions.

7. In a suit for partition, the plaintiffs, after their evidence is closed and after DW1 was examined, filed the present application seeking amendment of the plaint to enable them to claim a 2/24th share each in the compensation amount said to have been received by the 1st defendant in respect of one item of the suit schedule land that was acquired by National Highway Authority. The 1st defendant is opposing the amendment on the grounds that no proof is filed to show that the land is acquired & that the 1st defendant received the

compensation and that the amendment petition is belatedly filed when the suit is at the stage of adduction of further evidence on the side of the 1st defendant and that the contention of the plaintiffs that they are in joint possession of the suit properties is incorrect in view of their pleadings in the plaint and also the proposed pleadings in the proposed amendment. Be it noted that in a suit for partition, fixed court fee can be paid by the plaintiffs if anyone of the properties is in joint possession. Be that as it may. The plaintiffs by way of proposed amendment have shown the value of their shares out of the compensation amount as Rs.7,27,595/- . Since the plaintiffs are claiming a share in the money, they are anyhow bound to pay the necessary Court fee on the said amount of Rs.7,27,595/- , if they intend to claim a share in the compensation amount of Rs.43,65,575/- . Insofar as the contentions that the trial is at the stage of adducing further evidence on the side of the defendants, and that the amendment is belated and cannot be permitted and that the proposed amendment has no merit, it is necessary to refer to the legal position obtaining.

8. It is necessary to first 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.”

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

¹ (2008) 3 Supreme Court Cases 717

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.

Further, the Supreme Court having referred to a three-judge Bench decision in Sajjan Kumar v. Ram Kishan², 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.”

² (2005) 13 SCC 89

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 further evidence on the side of the defendants. 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 plaint is barred under the proviso to Order VI Rule 17 of the Code is devoid of merit and needs no countenance.

In the decision in VIDYABAI V/s. PADMALATHA³ 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 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

³ (2009) 2 Supreme Court Cases 409

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 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,

⁴ (2009) 10 SCC 84

⁵ (2008) 5 SCC 117

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 Others⁶, 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 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.”

In the above decision the Hon'ble Supreme Court further referred to the ratio in the decision in Pankaja and another v. Yellapa⁷ 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.”

9. One of the contentions of the plaintiffs is that when it was disclosed in the evidence that land was acquired and compensation was received by the 1st

⁶ 2013(1)ALD 1(SC)

⁷ AIR 2004 SC 4102

defendant, they came to know about the land acquisition proceedings and hence, seeking of the amendment was necessitated. Even as per the guidance in the decision of the Supreme Court an amendment can be permitted if it is intended to determine the real question in controversy and that all amendments, which are necessary for the purpose of determining real questions of controversy between the parties, shall be allowed if such amendments sought for do 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 the suit. The power of amendment should be exercised in the larger interests of doing full and complete justice between the parties and that all amendments, which are necessary for the purpose of determining the real question in controversy, should be allowed. Further, if the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed. The Court has also to consider whether the proposed amendment is intended to determine the real dispute between the parties. The law is well settled that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Further, as the refusal of the request seeking amendment does not preclude the plaintiffs from instituting a fresh suit, the refusal of the request leads to multiplicity of the litigation. In the well-considered view of this Court, if the amendment is permitted, though sought belatedly also helps in avoiding the multiplicity of the proceedings and in setting at rest the dispute between the parties. Be it noted that the law is well settled that 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. Therefore, for all the aforesaid reasons, granting of amendment of the plaint really sub-serves the ultimate cause of justice and avoids further

litigation and therefore, the amendment sought for by the plaintiffs deserves to 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 plaint and that the well considered order of the trial Court brooks no interference.

11. In the result, the Civil Revision Petition is dismissed subject to the condition that the plaintiffs shall pay the necessary court fee, as per the provisions of the Court Fee and Suits Valuation Act, on the value of the relief i.e., on the value of their shares in the compensation claimed in the suit.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, in this revision shall stand closed.

06.10.2017
Vjl



M. SEETHARAMA MURTI, J