

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No. 2384 OF 2015

ORDER:

This civil revision petition, under Article 227 of the Constitution of India, is filed by the unsuccessful petitioner before the I Additional Chief Judge, Secunderabad, challenging the order dated 23.02.2015 passed in I.A. No.4850 of 2014 in O.S. No.65 of 2008, whereby the learned I Additional Chief Judge dismissed the petition filed under Rule 17 of Order VI of the Code of Civil Procedure, 1908 (for short 'CPC').

For convenience of reference, the parties will hereinafter be referred to as the petitioner and the respondent.

The petitioner filed a petition under Rule 17 of Order VI of CPC seeking permission of the court to amend the plaint alleging that he is the owner and possessor of the suit schedule property plot bearing No.41 under registered sale deed bearing document No.741 of 2008 dated 22.05.2008. After purchase of the property, he came to know that the first respondent claiming rights over the schedule property based on the false and fabricated documents alleged to have been executed by the second respondent in favour of the first respondent. It is further contended that the second respondent alleged to have purchased plot No.41 from one Vanama Janardhan who is alleged to have purchased the same under unregistered sale deed dated 16.06.1979 which has been validated by paying deficit stamp duty and penalty on 01.02.2006. The alleged sale deed dated 16.06.1979 is a sham document as one of the executants of the alleged sale deed Narsimlu Mudiraj already

expired on 19.12.1977, thus his signature was forged on the alleged sale deed and brought into existence document No.412/2006.

It is also contended that he filed suit for declaration of his title to the schedule property and to set aside the sale deed in favour of defendants 1 and 2 declaring the same as illegal, null and void. Even if he obtained declaration of his title, no purpose would be served since both the sale deeds continue to be part of the record in the registration office and unless the sale deeds are cancelled, there is every possibility of claiming right.

It is also contended that though prosecuted the proceedings diligently, he was not advised by his counsel to seek separate relief of cancellation of the sale deeds, therefore he could not bring those facts on record to claim relief of cancellation of the documents. Thus, inspite of exercise of due diligence he could not bring those facts, by way of amendment in the plaint, claimed relief to avoid multiplicity of proceedings and settle the issue once for all, the petitioner can be permitted to amend the pleadings appropriately and sought permission to amend the pleadings incorporated in the plaint.

The first respondent filed counter denying the material allegations inter alia contending that he purchased plot bearing No.41 under unregistered sale deed bearing No.16.06.1979. The respondent simply denied the allegations made in the affidavit claimed title to the property. He contended that in view of the Proviso to Rule 17 of Order VI of CPC, no amendment is permissible after commencement of the trial, unless, the party

seeks amendment inspite of due diligence in bringing those facts. Since the petitioner did not exercise due diligence and seeking such relief of cancellation. The petitioner is disentitled to claim relief under the proviso to Rule 17 of Order VI of CPC and prayed to dismissal of the petition.

Upon hearing argument of both the counsel, the trial court dismissed the petition.

Aggrieved by the order passed by the trial court, the present revision is filed under Article 227 of the Constitution of India raising several contentions, mainly on the ground that in view of Proviso to Rule 17 of Order VI of CPC, amendment can be permitted even after commencement of the trial when the petitioner established that he exercised due diligence and it is also contended that the claim by proposed amendment is not barred by way of limitation, but the conclusion arrived by the trial court is without any basis, committed an error in dismissing the petition and prayed to allow the revision setting aside the order under challenge.

During hearing, Sri G.Ravichandran, learned counsel for the petitioner, mainly contended that the petitioner exercised due diligence, despite it he could not get the plaint amended claiming relief of declaration, dismissal of petition to amend the plaint is an illegality that apart the relief. But the trial court did not consider these two aspects in proper perspective and committed serious error in dismissing the petition and in case the petitioner is not permitted to amend the plaint incorporating the proposed amendment, it would cause irreparable injury to the petitioner.

But the trial court in haphazard manner dismissed the application without considering the rival contentions raising before the court. The petitioner is able to establish he exercised due diligence and in spite of it he could not bring the facts by way of amendment and claim relief he is entitled to get the plaint amended to avoid multiplicity of proceedings.

Whereas the counsel for the first respondent argued totally in support of the order passed by the trial court while contending that if the petitioner is permitted to amend the plaint it would take away the valuable right of the first respondent that apart the proposed amendment would change the nature of the suit. Basing on the law declared in the judgments of the Apex Court in **Ajendraprasadji N. Pandey and another v. Swami Keshavprakeshdasji N. and others¹** and **Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others²** prayed to dismiss the revision.

Considering rival contentions and perusing the material available on record, the point that arise for consideration is,

"Whether the proposed amendment would change the nature of the suit and take away the valuable right that accrued to the respondents or admission, if any, made in the pleadings by the petitioner? Whether the petitioner exercised due diligence in bringing the facts by way of amendment? If not, whether the order dated 23.02.2015 in I.A. No.4850 of 2014 in O.S. NO.65 of 2008 passed by the trial court be sustained?"

IN Re. POINT:

¹ (2006) 12 SCC 1

² (2009) 10 SCC 84

Undisputedly the suit in O.S. No.65 of 2008 was filed for the relief of declaration and injunction claiming title under registered sale deed dated 22.05.2008 and rectification deed dated 31.05.2008. The relief claimed in the plaint is as follows:

- "a. To declare the plaintiff as sole and absolute owner of suit schedule property.
- b. To grant consequential a perpetual injunction restraining the defendants their agents, servants and any other person claiming through, from interfering the plaintiff's possession over the suit schedule property.
- c. To award costs.
- d. Any other reliefs."

The respondents filed written statement on 26.07.2008 denying title of the petitioner and claiming title to the property under registered sale deed, which is sought to be cancelled by way of proposed amendment.

The trial court framed issues and trial has been commenced long back. After commencement of trial, the petitioner filed the present I.A.No.4850 of 2014 on the ground that his counsel did not advise to seek relief of cancellation etc. Therefore, the petition was filed before the trial court only after commencement of the trial. In such case it is the duty of the petitioner to satisfy the court that he exercised due diligence, despite it he could not bring the facts by way of amendment to seek relief.

The only reason, the petitioner assigned before the trial court is that his counsel did not advise him, thus the petitioner is ignorant of the law and due to lack of advise, he could not file a petition before commencement of the trial. Ignorance of law is not

excuse, apart from that exercise of due diligence is a question of fact to be decided. The court has to take into consideration various attending circumstances to find out whether the petitioner really exercised due diligence.

In the present case except alleging that the counsel did not advise the petitioner, nothing has been brought on record that he had exercised due diligence, failure of the counsel to give correct advise by itself is not a ground to establish that he exercised due diligence. The petitioner proceeded with the trial and examined his witnesses denying the title of the respondents, though he set up the title to the property by registered sale deed, which was later validated by paying stamp duty penalty etc.

It is not the case that the sale deeds sought to be cancelled were not within the knowledge of the petitioner. In such case it is his duty to prove that he exercised due diligence and despite it he could not get plaint amended to appropriate relief sought for by way of proposed amendment.

The word 'due diligence' is not defined anywhere, but in **“Bharat Petroleum Corporation Ltd. v. Precious Finance Investment Pvt. Ltd³”**

“The Dictionary meaning of the expression “due diligence” as given in the Blacks Law Dictionary, Sixth Edition, 1990 means “Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.” Similarly the Law Lexicon by

³ 2006 (6) BomCR 510

P. Ramanatha Aiyer, Second Edition (Reprint) 2001 explains "due diligence" to mean such watchful caution and foresight as the circumstances of the particular case demands. While examining the explanation offered or cause shown as to why in spite of due diligence a party could not have raised the matter before commencement of trial, the Court may have to see the circumstances in which the party is seeking amendment. In short the explanation as to "due diligence" depends upon the particular circumstances and the relative facts of each case to reach a conclusion one way or the other."

In "**Chander Kanta Bansal v. Rajinder Singh Anand**⁴" the Apex Court while deciding a matter pertaining to amendment of pleadings under Order VI Rule 17 of C.P.C. discussed about the word "due diligence" in paragraph No.16 as follows:

"The words "due diligence" has not been defined in the Code. According to Oxford Dictionary (Edition 2006), the word "diligence" means careful and persistent application or effort. "Diligent" means careful and steady in application to one's work and duties, showing care and effort. As per Black's Law Dictionary (Eighth Edition), "diligence" means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "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. According to Words and Phrases by Drain-Dyspnea (Permanent Edition 13A) "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

In view of the definition of the word 'due diligence' referred supra in the judgment of Bombay High Court and Apex Court, the

⁴ (2008) 5 Supreme Court Cases 117

petitioner has to prove that he has acted as an ordinary reasonable prudent man and it is a question of fact. It is for the petitioner that he has taken every care and caution in prosecuting the proceedings.

But here there is nothing on record to say that he has exercised due diligence, despite, he could not seek cancellation of sale deed or declaration that the sale deeds are null and void by way of proposed amendment.

The trial court placing reliance on **Vempalli Srinivasula Reddy v. V.M. Ramakrishna Reddy and others**⁵, wherein it was observed that liberal approach to be adopted in relation to pre-trial amendments cannot be extended in the same vigour to post-trial amendments too, to avoid violence to proviso added by Amendment Act.

These observations are of no assistance to the petitioner as the trial has already been commenced and it is in the mid way. Therefore, it is imperative on the **part** of the petitioner to prove that he had exercised due diligence, but the facts on record does not disclose that he had exercised due diligence.

Learned counsel for the petitioner would contend that 'commencement of trial' is not defined anywhere till the matter is posted for arguments, it cannot be treated that the trial has been commenced.

However, the contention is contrary to the law declared by the Apex Court in **Ajendra Prasadji N.Pandey and another v.**

⁵ 2006(1) ALT 160

Swami Keshavprakeshdasji N. and others⁶. In the said judgment, at paragraph 43, it was held as follows:

"Under the proviso no application for amendment shall be allowed after the trial has commenced, unless inspite of due diligence, the matter could not be raised before the commencement of trial. It is submitted, that after the trial of the case has commenced, no application of pleading shall be allowed unless the above requirement is satisfied. The amended Order VI Rule 17 was due to the recommendation of the Law Commission since Order 17 as it existed prior to the amendment was invoked by parties interested in delaying the trial. That to shorten the litigation and speed up disposal of suits, amendment was made by the Amending Act, 1999, deleting Rule 17 from the Code. This evoked much controversy/hesitation all over the country and also leading to boycott of Courts and, therefore, by Civil Procedure Code (Amendment) Act, 2002, provision has been restored by recognizing the power of the Court to grant amendment, however, with certain limitation which is contained in the new proviso added to the Rule. The details furnished below will go to show as to how the facts of the present case show that the matters which are sought to be raised by way of amendment by the appellants were well within their knowledge on their Court case, and manifests the absence of due diligence on the part of the appellants disentitling them to relief."

In view of the judgment, when the fact is within their knowledge and trial has been commenced, the court cannot permit the parties to raise such contention, except by satisfying the court that he had exercised due diligence, despite it he could not bring those facts in the plaint. In the same judgment, it was held that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

⁶ (2006) 12 SCC 1

In the present case, undisputedly, the witnesses were already examined on behalf of the petitioner. The respondent denied the disputed sale deeds sought to be cancelled, annulled or declared as null and void by way of proposed amendment. In such case the court cannot permit the petitioner to amend the plaint as those facts are within his knowledge and proceeded with the trial, without seeking such relief. Therefore the amendment cannot be allowed, at this stage in view of the interdict contained in the Proviso to Rule 17 of Order VI of CPC.

The counsel for the respondents mainly contended that the relief sought by the petitioner is already barred by limitation and such time barred relief cannot be permitted to be brought on record by way of amendment under Rule 17 of Order VI of CPC.

The suit was filed in the year 2008 and the limitation under Article 59 of the Limitation Act to cancel or set aside an instrument or decree or for the rescission of a contract is for three years, commences when the facts entitling the plaintiff to have the instrument or decree cancelled or set aside or the contract rescinded first become known to him.

Validation of the document may not be within the knowledge, but when the defendant filed written statement in the suit on 26.07.2008, the factum of execution of document sought to be annulled or declared as null and void, knowledge is attributable to the petitioner. The present petition was filed before the trial court in the year 2014, almost after lapse of 6 years when a factum of the execution of sale deed allegedly came to knowledge of the petitioner. He would have been sought amendment immediately after filing written statement atleast after framing issues, but

leisurely approached the court, at his convenience, to claim proposed amendment.

In the present case, the limitation starts from the date of factum of execution of sale deed in favour of defendants 1 and 2 came to the notice of the petitioner i.e. date of filing written statement, and the limitation to claim cancellation or annulment of the documents or declaration that they are null and void is only for 3 years from the date of knowledge, but he did not get the plaint amended.

Learned counsel for the respondents while contending that time barred amendment cannot be allowed, drawn the attention of this court to the Judgment of the Apex Court in **Revajeetu Builders and Developers v. Narayanaswamy and Sons and others** (2nd supra), wherein the Apex Court specifically held, at guideline No.6 at paragraph 63, that 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.

Taking advantage of guideline No.6, he would contend that on the date of filing petition on 31.10.2014 the claim by way of proposed amendment is barred by limitation in view of Article 59 read with Section 21 of Limitation Act. In such case the court cannot allow the proposed amendment and thereby applying principle laid down in the above judgment dismissal of the petition by the trial court cannot be faulted as the proposed amendment is barred by limitation and further the petitioner failed to establish that despite exercise of due diligence, he could not bring those facts on record and claimed reliefs by way of proposed amendment.

No doubt amendment can be allowed to avoid multiplicity of proceedings and minimise the litigation as held by this Court in **Kovvuri Ramakrishna Reddy v. Padala Satyanarayana Reddy and another**⁷

But in view of the judgment of the Apex Court in **Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others** (2nd supra), the court cannot allow time barred relief as a general rule even if he satisfied the court, despite exercise of due diligence he could not bring those facts on record to claim relief by way of proposed amendment, Avoidance of multiplicity of proceedings by itself is not a ground in view of the law declared by the Apex Court in **Revajeethu Builders and Developers** (2nd supra), since the proposed amendment is patently barred by limitation.

Hence, I find no error in the order under challenge warranting interference of this court exercising power under Article 227 of the Constitution of India.

Article 227 of Constitution of India deals with power of superintendence by the High Court over all Subordinate Courts and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction and such power can also be exercised suo motu. It is a well settled principle that the High

⁷ 2012(4) ALT 1

Court can exercise supervisory power under Article 227 of Constitution of India, as held by the Apex Court in **State (N.C.T. Of Delhi) v. Navjot Sandhu@ Afsan Guru**⁸ that under Article 227 of Constitution of India the High Court can interfere with the directions of the Subordinate Courts.

In view of the law declared by the Apex Court in **Revajeetu Builders and Developers v. Narayanaswamy and Sons and others** (2nd supra), the civil revision petition is liable to be dismissed.

In the result, the civil revision petition is dismissed. No costs.

Miscellaneous petitions, if any, pending in this civil revision petition shall stand closed.

M.SATYANARAYANA MURTHY, J

Date: 21.06.2017
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⁸ (34)2005 (3) ALT (CrI.) 125 (SC)