

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.3729 OF 2014

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India challenging the order dated 22.8.2014 in I.A. No.2588 of 2012 in O.S. No.36 of 2011 on the file of the Court of III Additional District Judge, Kurnool at Nandyal.

2. The facts leading to filing of the present revision petition are briefly as follows: the respondents herein filed O.S. No.36 of 2011 against the petitioners herein, on the file of the Court of III Additional District Judge, Kurnool at Nandyal, for cancellation of the sale deed dated 29.8.2011. The respondents filed I.A. No.2588 of 2012 under Order VI Rule 17 of CPC seeking for amendment of the relief portion in the plaint. After hearing both sides, the trial court allowed the I.A. No.2588 of 2012 on 21.1.2013. Feeling aggrieved by the order of the trial court, the petitioners filed CRP No.707 of 2013 and the same was allowed by this court on 28.2.2013, by setting aside the order dated 21.1.2013 in I.A. No.2588 of 2012, remanded the matter to the trial court with a direction to examine the matter in the light of the proviso to Rule 17 of Order VI of CPC. The trial court, after affording reasonable opportunity of hearing to both the parties, by the impugned order dated 22.8.2014, allowed I.A. No.2588 of 2014. Hence, the present revision petition.

3. The learned counsel for the petitioners challenged the impugned order on the following grounds: (1) the respondents have failed to establish that despite due diligence they could not have

noticed the defect in the prayer portion at the earliest point of time; (2) in spite of specific direction by this court in CRP No.707 of 2013, the trial court has not given any specific finding with regard to the requirement of proviso to Rule 17 of Order VI of CPC; (3) the trial court has not taken into consideration whether the proposed amendment would sub-serve the ultimate cause of justice; and (4) the order passed by the trial court is not sustainable either on facts or in law; therefore, it is a fit case to allow the revision petition. ***Per contra***, learned counsel for the respondents submitted that the finding of the trial court that the proposed amendment in relief portion of the plaint would not alter the nature of the suit or cause of action is supported by the material available on record. He further submitted that the respondents are rustic villagers; therefore, they could not notice the defect in the prayer portion in spite of due diligence and the same was considered by the trial court in right perspective; and (3) there is no illegality, irregularity or impropriety in the order passed by the trial court, to warrant interference of this court.

4. To substantiate the arguments, learned counsel for the petitioners has drawn the attention of this court to the following decisions:

(1) **Chander Kanta Bansal v Rajinder Singh Anand**¹ wherein the Hon'ble apex court held at Paragraph Nos.15 and 16 as follows:

15. As discussed above, though first part of Rule 17 makes it clear that amendment of pleadings is permitted at any stage of the proceeding, the proviso imposes certain restrictions. It makes it clear that after the commencement of trial, no application for amendment shall be allowed. However, if it is established that in spite of "due diligence" the party could not have raised the matter before the commencement of trial depending on the circumstances, the court is free to order such application.

¹ (2008) 5 SCC 117

16. The words “due diligence” have not been defined in the Code. According to *Oxford Dictionary* (Edn. 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* (18th Edn.), “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 Edn. 13-A) “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.

(2) **J.Samuel v Gattu Mahesh**² wherein the Hon’ble apex court

held at Paragraph Nos.16 and 19 as follows:

16. As stated earlier, in the present case, the amendment application itself was filed only on 24-9-2010 after the arguments were completed and the matter was posted for judgment on 4-10-2010. On proper interpretation of the proviso to Rule 17 of Order 6, the party has to satisfy the court that it could not have discovered that ground which was pleaded by amendment, in spite of due diligence. No doubt, Rule 17 confers power on the court to amend the pleadings at any stage of the proceedings. However, the proviso restricts that power once the trial has commenced. Unless the court satisfies (*sic* itself) that there is a reasonable cause for allowing the amendment, normally the court has to reject such a request.

19. Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term “due diligence” is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

5. In support of the impugned order, the learned counsel for the respondents has drawn the attention of this court to the following decisions:

(1) **South Konkan Distilleries v Prabhakar Gajanan Naik**³

wherein the Hon’ble apex court held at Paragraph No.11 as follows:

² (2012) 2 SCC 300

11. ... It is well settled that the court must be extremely liberal in granting the prayer for amendment, if the court is of the view that if such amendment is not allowed, a party, who has prayed for such an amendment, shall suffer irreparable loss and injury. It is also equally well settled that there is no absolute rule that in every case where a relief is barred because of limitation, amendment should not be allowed. It is always open to the court to allow an amendment if it is of the view that allowing of an amendment shall really subserve the ultimate cause of justice and avoid further litigation.

(2) **Abdul Rehman v Mohd. Ruldu**⁴ wherein the Hon'ble apex court Paragraph Nos.17 and 18 as follows:

17. In *Pankaja v. Yellapa*, (2004) 6 SCC 415, this Court held that if the granting of an amendment really subserves the ultimate cause of justice and avoids further litigation, the same should be allowed. In the same decision, it was further held that an amendment seeking declaration of title shall not introduce a different relief when the necessary factual basis had already been laid down in the plaint in regard to the title.

18. We reiterate that all amendments which are necessary for the purpose of determining the real questions in 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.

(3) **Daggumati Malakonda Reddy v Puligunta Malakonda**

Reddy⁵ wherein this court held at Paragraph No.5 as follows:

5. It is no doubt true that the revision petitioner in his affidavit filed in support of the petition for amendment, had, without mentioning any reasons for seeking the proposed amendment, stated that in view of the advice given by his Counsel he is filing the petition for amendment of the plaint. Since parties act on the advice of their Counsel only petitioner not specifically mentioning the reasons for seeking the amendment may not be of any consequence in this case because the respondent would not in any way be prejudiced by the non-mention of the reasons for seeking the proposed amendment. For that reason and for the reason that merits of a proposed amendment need not be gone into at the time of deciding the petition seeking amendment of the pleadings, and for the reason that respondents will have an opportunity to contest claim introduced by way of the proposed amendment by filing an additional written statement, and since the Apex Court in *Jai Jai Ram Manohar Lal v. National Building Material*

³ (2008) 14 SCC 632 = AIR 2009 SC 1177

⁴ (2012) 11 SCC 341 = 2013 (1) ALD 1 (SC)

⁵ 2006 (2) ALD 784

Supply, Gurgaon, (1969) 1 SCC 869, held that the rules of procedure are intended to be hand made to the administration of justice and that a party cannot be refused a just relief merely because of some mistake, negligence or inadvertence or other reasons, I am of the opinion that the trial Court was in error in dismissing the petition of the revision petitioner seeking amendment of the plaint.

(4) **Mahila Ramkali Devi v Nandram (D) Thr. LRs**⁶ wherein the

Hon'ble apex court held at Paragraph No.20 as follows:

20. It is well settled that rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of rules of procedure. The court always gives relief to amend the pleading of the party, unless it is satisfied that the party applying was acting mala fide or that by his blunder he had caused injury to his opponent which cannot be compensated for by an order of cost.

(5) **Sarabjit Kaur v Joginder Singh Bamra**⁷ wherein Punjab &

Haryana High Court held at Paragraph Nos.7 and 9 as follows:

7. Above provisions makes it ample clear that Order 6 Rule 17 commences with the words "the court may at any stage of the proceedings" and thereafter, goes on to confer a power to allow either party to alter or amend his pleadings, where it appears to the court that the amendment is necessary for the purpose of determining the real questions in controversy. The proviso, by use of the expression "Provided that no application for amendment shall be allowed after the trial has commenced" appears to place an embargo on the power of a court to allow amendment of pleadings after the trial has commenced. If the proviso were to end with this expression, it could justifiably be argued that pleadings cannot be amended after the commencement of a trial. The proviso, however, qualifies the prohibitory expression by the use of the words "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" thereby clarifying that the embargo is not absolute and the court, may if circumstances so permit, allow an amendment after the commencement of the trial.

8.

9. Above provisions revealed that even after the commencement of a trial, the power of the Court to amend the pleadings, subsists, but the Court must consider the facts that the amendment is necessary for the purpose of determining the real controversy and if the applicant satisfies the Court that despite the exercise of due diligence, he could not raise the pleadings before the trial commenced, allow such a prayer, even after the commencement of the trial.

⁶ AIR 2015 SC 2270

⁷ 2016 (181) PunLR 719

(6) **Usha Devi v Rijwan Ahmad**⁸ wherein the Hon'ble apex court

held at Paragraph Nos.15, 16 and 17 (SCC) as follows:

15. In view of the decision in *Sajjan Kumar v Ram Kishan*, (2005) 13 SCC 89, we are of the view that this appeal too deserves to be allowed. 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.

16. As to the submission made on behalf of the respondents that the amendment will render the suit non-maintainable because it would not only materially change the suit property but also change the cause of action it has only to be pointed out that in order to allow the prayer for amendment the merit of the amendment is hardly a relevant consideration and it will be open to the respondent-defendants to raise their objection in regard to the amended plaint by making any corresponding amendments in their written statement.

17. The counsel for the respondents also submitted that as a result of the description of the suit property in the plaint the respondent-defendants had to suffer injunction against their own property. We feel that the ends of justice would meet by allowing the proposed amendment subject to a cost of Rs 10,000.

(7) **J.Yadagiri Reddy v J.Hemalatha**⁹ this court held at

Paragraph Nos.7, 8, 9 and 14 as follows:

7. It is appropriate to notice the predominant purpose behind the Rule 17 of Order VI is to minimize the litigation and the avoidance of multiplicity of suits. Consequently, if there is no material inconsistency between the original averments and those which are sought to be introduced by way of amendments, such amendments should be allowed.

8. The consistent policy of the Courts in this Country was not to adopt a hyper-technical approach while dealing with applications for amendment of pleadings which would result in defeating the ends of justice.

9. Thus, the paramount consideration that should be shown to an application for amendment is whether the ends of justice would be served better or not by allowing such an amendment instead of denying the same.

14. In the instant case, the plaintiff has already squarely put in issue the correctness and the legality of the 2 sale deeds by specifically praying for their cancellation. However, the petitioner/plaintiff not being a party to those 2 documents could not have prayed for cancellation of any such document. On the other hand, the more appropriate course in such a fact situation was to seek for a declaration

⁸ AIR 2008 SC 1147

⁹ 2016 (3) ALD 52

that such documents do not bind the plaintiff. That is exactly what is now sought to be done by filing the amendment application. I am, therefore, convinced that the petitioners herein are not put to any serious or irreparable injury or loss by the proposed amendment. It is not in any manner seeking to alter the line of action which was originally planned in the suit. Nor does it seek to defeat any of the rights of the parties emanating from the pleadings set up earlier. It is merely substitution of an appropriate relief instead of cancellation as was initially prayed for. In other words, substantially there is no change in the line of action initiated by the plaintiff. I am, therefore, of the opinion that the exercise of jurisdiction as was reflected in the order passed by the Court below does not call for any interference.

Let me consider the facts of the case on hand in the light of the above legal principles.

6. The respondents filed the suit against the petitioners for cancellation of Ex.B1 sale deed dated 29.8.2011. It is the case of the respondents that second petitioner is having life interest only in the suit schedule property; therefore she has no right whatsoever to execute the sale deed in favour of the first petitioner. In nutshell the contention of the respondents is that Ex.B1 sale deed dated 29.8.2011 is void one. It is not in dispute that the respondents are not parties to Ex.B1 sale deed. Whether the second petitioner is having absolute rights or limited interest in the suit schedule property is the subject matter of the suit, which has to be adjudicated by the trial court.

7. The present application for amendment of prayer is filed by the respondents-plaintiffs. It is needless to say that pleadings form bedrock in a civil suit. To put it in a different way, the edifice of civil suit is built on the pleadings. At the time of presenting the plaint, the plaintiff should plead necessary and relevant facts in order to adjudicate the *lis* involved in the suit effectively. Basing on such facts much less the material facts, the plaintiff has to

adduce oral and documentary evidence in order to substantiate his claim thereby to get the relief sought for. The relief sought by the plaintiff should be based on the pleadings in the plaint. A duty is cast on the defendant to deny the facts much less the material facts specifically. The respondents are very much aware of the relief claimed by them at the time of filing of the suit itself.

8. During the pendency of the suit, the respondents filed I.A. No.6 of 2012 seeking amendment of relief portion as, *“for declaration of cancellation of the said registered sale deed 29.8.2011 as it is a void document and a fraudulent transfer”*. The trial court, by order dated 03.1.2012, allowed I.A. No.6 of 2012. It is not in dispute that the petitioners have not challenged the order in I.A. No.6 of 2012. The learned counsel for the petitioners strenuously submitted that the respondents have not paid the court fee for the relief of declaration. There is no proper explanation from the respondents for non-payment of court fee. This aspect is to be considered by the trial court while delivering the judgment. The trial court, after hearing the learned counsel for both the parties, reserved the suit for judgment. At that point of time, the respondents filed I.A. No.2588 of 2012, seeking amendment of the prayer portion to the effect that *“for declaration that the alleged registered sale deed 29.8.2011 executed by the second defendant herein in favour of the first defendant herein is a null and void document in the eye of law, not enforceable and not binding on the plaintiffs as the second defendant has got only limited rights in the plaint schedule property and for consequential recovery of possession of the plaint schedule property after the life time of the second defendant”*. As observed earlier, the trial court

allowed I.A. No.2588 of 2012 on 21.1.2013 and the same was challenged by the petitioners vide CRP No.707 of 2013. While disposing of C.R.P. No.707 of 2013, this court made the following observations:

The proviso to Order VI Rule 17 C.P.C., is attracted the moment the trial commences. The court below was obligated to examine whether or not the party, who sought amendment of the pleadings, had exercised due diligence despite which he was unable to seek amendment of pleadings before commencement of trial. The Court below has failed to examine the requirement of the proviso to Order VI Rule 17 C.P.C.

The impugned order is, accordingly, set aside and I.A. No.2588 of 2012 in O.S.No.36 of 2011 before the III Additional District Judge, Kurnool at Nandyal, is restored to file. The Court below shall examine the application afresh, among others, also in the light of the proviso to Order VI Rule 17 C.P.C. after giving both the parties an opportunity of being heard in this regard.

9. The crucial question that falls for consideration is whether the trial court has considered the proposed amendment in the light of the proviso to Order VI Rule 17 C.P.C., or not. There is no much controversy between the parties with regard to the scope of Order VI Rule 17 of CPC. It is needless to day that the courts allow amendment petitions (i) in order to avoid multiplicity of litigation, and (2) to secure the ends of justice. That does not mean the court shall allow the parties to amend the pleadings, without considering the scope of proviso to Rule 17 of Order VI of. In order to address the question, it is apposite to refer the finding of the trial court on this aspect.

Now, the question of due diligence exercised by the plaintiffs/petitioners. The main contention of the petitioners/plaintiffs is that they are rustic villagers and they are advised them for amendment of the plaint and there is quite possible mishap herein if the prayer portion of the plaint is not amended. However, due to amendment of prayer portion, there is no change of cause of action and is not going to change of nature of the suit etc., and also not going to affect the merits of the case. Hence, the matter can be raised at present, though the matter is ripe for judgment. Thus, it is a fit matter where the petition is to be allowed.

10. A perusal of the above paragraph clearly demonstrates that the trial court simply reproduced the contention of the respondents (plaintiffs). By any stretch of imagination, it cannot be presumed that the contention raised by the parties to the proceedings amounts to finding of the court. The trial court has not bestowed its interest to give a specific finding. Whether the respondents have satisfied the conditions stipulated in proviso to Rule 17 of Order VI of CPC i.e., the respondents could not trace out the defect in the relief portion despite due diligence, is the core issue to be considered by the trial court in view of specific direction of this court in CRP No.707 of 2013. The trial court has given go-bye to the direction of this court in CRP No.707 of 2013 and simply allowed the I.A., by reproducing the contention of respondents (plaintiffs). The learned counsel for the respondents submitted that though the trial court has not specifically answered the point, still this court can consider over all facts and circumstances of the case and allow the amendment petition.

11. The respondents filed I.A.No.6 of 2012 for amendment of the relief portion and the same was allowed by the trial court. That fact was not considered in right perspective, except referring the same, by the trial court in the impugned order in I.A. No.2588 of 2012. The factum of defect in the prayer portion is within the knowledge of the respondents at the time of filing I.A. No.6 of 2012. If the respondents have taken a little bit care or caution, the question of filing present amendment petition would not have arisen.

12. When the respondents identified the defect while filing I.A. No.6 of 2012, they ought to have taken a reasonable care while moulding the relief in such a manner so as to suit the facts much less the material facts pleaded by them. Had the trial court taken little bit care and caution, petitioners would not have been forced to approach this court second time, on the same point, hopping that the respondents have not satisfied the test of due diligence as contemplated under the proviso to Rule 17 of Order VI of CPC.

13. The petitioners have taken a specific plea in the counter that if the proposed amendment is allowed, certainly they will be put in disadvantageous position. It is needless to say that the parties to the proceedings will always want to take advantage out of deficiencies and laches on the part of the opposite party. If the amendment petition is allowed, certainly it would amount to allowing the respondents to fill up the gaps or condoning the laches on their part, which is not permissible under law. Surprisingly, the respondents sought the relief of recovery of possession for the first time in the present amendment petition. If the proposed amendment is allowed, the suit which is filed for cancellation of sale deed would be converted into a suit for declaration as well as recovery of possession. The relief of recovery of possession is not asked by the respondents at the time of filing of the suit or at the time of filing first amendment petition i.e., I.A. No.6 of 2012. Generally, the relief of recovery possession is a consequential one to the relief of declaration. Such a relief can be sought when the main relief is for declaration of right or title to the suit schedule property. In the case on hand, the original prayer is for cancellation of sale deed. By allowing the first amendment

application i.e., I.A. No.6 of 2012, the prayer was amended as *'declaration of cancellation of the said registered sale deed dated 29.8.2011 as it is a void document and a fraudulent transfer.'* Now, by way of proposed amendment, the respondents are seeking the relief of recovery possession of the suit schedule property. There is no proper foundation in the pleadings of the respondents, which enables them to seek the relief of *"recovery of possession of the plaint schedule property after the life time of the second defendant"*. There is no nexus between the pleadings in the plaint and the proposed amendment in the relief portion as to recovery of possession of suit schedule property.

14. In the light of the foregoing discussion, I have no hesitation to hold that the respondents have not shown due diligence as provided under Rule 17 of Order VI of CPC, in order to grant the relief as prayed for.

15. The learned counsel for the respondents submitted that this court, while exercising jurisdiction under Article 227 of Constitution of India, cannot interfere with the orders of the court below. To substantiate the argument, he has drawn the attention of this court to the decision in **Estralla Rubber v Dass Estate (P) Ltd**¹⁰ wherein the Hon'ble apex court held at Paragraph No.6 as follows:

6. The scope and ambit of exercise of power and jurisdiction by a High Court under Article 227 of the Constitution of India is examined and explained in a number of decisions of this Court. The exercise of power under this article involves a duty on the High Court to keep inferior courts and tribunals within the bounds of their authority and to see that they do the duty expected or required of them in a legal manner. The High Court is not vested with any unlimited prerogative to correct all kinds of

¹⁰ (2001) 8 SCC 97

hardship or wrong decisions made within the limits of the jurisdiction of the subordinate courts or tribunals. Exercise of this power and interfering with the orders of the courts or tribunals is restricted to cases of serious dereliction of duty and flagrant violation of fundamental principles of law or justice, where if the High Court does not interfere, a grave injustice remains uncorrected. It is also well settled that the High Court while acting under this article cannot exercise its power as an appellate court or substitute its own judgment in place of that of the subordinate court to correct an error, which is not apparent on the face of the record. The High Court can set aside or ignore the findings of facts of an inferior court or tribunal, if there is no evidence at all to justify or the finding is so perverse, that no reasonable person can possibly come to such a conclusion, which the court or tribunal has come to.

16. As observed earlier, in the instant case, the trial court has not considered the scope of proviso to Rule 17 of Order VI of CPC. If the impugned order is allowed to stand, certainly it would amount to miscarriage of justice. *Ex facie*, there is illegality and irregularity in the impugned order passed by the trial court; therefore, it is a fit case to set aside the same while exercising the jurisdiction under Article 227 of the Constitution of India.

17. In the result, the civil revision petition is allowed, setting aside the order dated 22.8.2014 in I.A. No.2588 of 2012. Consequently I.A. No.2588 of 2012 in O.S. No.36 of 2011 on the file of the Court of III Additional District Judge, Kurnool at Nandyal is dismissed. The trial court is hereby directed to dispose of the suit in accordance with law without being influenced by any of the observations made by this court in this revision petition. Miscellaneous petitions, if any pending in this revision petition, shall stand closed.

T.SUNIL CHOWDARY, J.

Date: 23.3.2017
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