THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.1042 of 2017

ORDER:

This revision under Article 227 of the Constitution of India is filed assailing the order in I.A.No.158 of 2014 in O.S.No.64 of 2006 dated 11.11.2016 passed by the Special Judge for trial of offences under SCs & STs (POA) Act cum VI Additional Metropolitan Sessions Judge, City Civil Courts, Secunderabad, allowing the application filed under Order VI Rule 17 of CPC granting leave to amend the plaint.

The parties hereinafter will be referred to as they are arrayed before the trial Court.

The respondents herein, who are plaintiffs before the trial Court filed a petition under Order VI Rule 17 of CPC seeking leave of the trial Court to amend the plaint on the ground that they did not disclose the true and correct particulars of the investments made by the Hindu Undivided Family (HUF) and had in fact kept the entire documents with them and as such petitioners did not include various items of the property in the schedule. But in the O.P.No.131 of 2006 on the file of Judge, Family Court, Secunderabad, filed for dissolution of marriage by granting decree of divorce, the petitioners-plaintiffs disclosed the investments in SBH, Begumpet Branch, Karnataka Bank, Secunderabad Branch and other details. Therefore, those items of the property are also to be included in the schedule so as to claim share in the entire property of the joint family in the suit for partition and annexed the list of property i.e., deposits through the petition filed under Order VI Rule 17 requesting to permit the petitioners to include those items in the schedule.

The respondent filed counter denying material allegations mainly contending that after commencement of trial the amendment cannot be permitted and the same is contrary to the proviso to Order VI Rule 17 and the trial in fact has been commenced on 05.03.2008, later, obtained nearly 15 adjournments without proceeding with the trial of the case. On 24.04.2008, the suit was posted for recording evidence of plaintiffs and once again they took time on lame excuses, hence the petitioners at the stage are not entitled to seek leave of the court to amend the plaint.

It is also contended by the petitioner herein that the deposits are not in the name of HUF and he alone is entitled to deal with the amount lying in the deposits to the credit of the account maintained with the two banks referred above and therefore, the petitioners/plaintiffs are not entitled to claim any share in the amount. Finally, it is contended that the production of bank statement before the Court in O.P.No.131 of 2006 is not the basis in the plaint and prayed to dismiss the petition.

The trial Court upon hearing argument of both the counsel, allowed the application recording specific reason that the trial has not been commenced since the witnesses did not enter into the box to depose on behalf of the plaintiffs, therefore, the bar under proviso to Order VI Rule 17 will not come in the way of granting leave to amend the plaint.

Aggrieved by the order passed by the trial Court dated 11.11.2016 the present revision is filed raising certain contentions. The main ground urged before this court is that the trial has already been commenced and in such case the question of granting leave does not arise in view of the proviso to Order VI Rule 17 and apart from that the disclosure of bank deposits in O.P.No.131 of 2016 is not decisive to decide the share of the petitioners/plaintiffs in the schedule proposed to be added to the plaint, therefore, the merits of the proposed amendment have to be taken into consideration while deciding an application under Order VI Rule 17 of CPC. But the trial Court committed serious error in ordering the petition filed under Order VI Rule 17 and prayed to set aside the same.

During hearing, Smt.Pramada, learned counsel while reiterating the contentions urged before this Court mainly relied on the proviso to Order VI Rule 17 of CPC since the trial has already been commenced on the date when the issues were framed but adjourned the matter on one pretext or the other, would not enure any benefit to the petitioners/plaintiffs to seek leave of the court to amend the plaint under Order VI Rule 17 of CPC, the trial Court did not consider what is the exact date of commencement of trial for the purpose of deciding the petition under Order VI Rule 17 of CPC and committed an error. Apart from that, the material on record would not disclose the basis for such amendment and in the absence of any basis to such plea, the amendment cannot be permitted and prayed to allow the revision petition setting aside the order passed by the trial Court in I.A.No.158 of 2014 in O.S.No.64 of 2006 dated 11.11.2016.

Per contra, Smt.Manjari S.Ganu, learned counsel, while supporting the order in all respects under challenge in this revision would contend that the respondents herein specifically reserved their right to amend the plaint since full particulars of the said investments presently were not known to the plaintiffs, making specific averment in Para 4 so also in Para – 6 of the plaint, the plaintiffs reserved their right to take appropriate steps to amend the plaint when ever the full particulars of deposits came to their notice, they are entitled to obtain leave to amend the plaint under Order VI Rule 17 and apart from that the witnesses were not yet examined, therefore, the question of commencement of trial would not arise. Hence, the bar under proviso to Order VI Rule 17 would not come in the way of granting leave to amend the plaint and prayed to confirm the order passed by the trial Court dismissing the revision petition.

On considering rival contentions and the material available on record, now the point that arises for consideration is:

"Whether the proposed amendment would change the nature of the suit, takes away the valuable right that accrued to the respondent or withdraws the admission if any made by the plaintiffs in the plaint and barred by limitation, if not, whether leave can be granted to the petitioners/plaintiffs to amend the plaint as claimed in the petition?"

POINT:

The suit was filed for partition of various items of the schedule property shown in the plaint and at the same time reserved their right in Para - 4 of the plaint and few sentences of para 4 of the plaint are extracted hereunder for better appreciation:

> "Full particulars of the said investments are presently not known to the plaintiffs. It is pertinent to note that the said HUF consists of plaintiffs and defendant as its member and as such the plaintiffs have their 1/3rd share each in respect of the investments and the properties belonging to Mukesh Teli HUF. In view of the estrangement between the mother of the plaintiffs and the defendant and the attitude adopted by the defendant it has become apparent that he has no intention to honour his commitment as Karta of HUF.

> The defendant has been appropriating monies, transferring shares and other investments against the interest of the other members of HUF so as to cause material loss to the plaintiffs. The defendant has been taking such illegal steps as he is aggrieved with the plaintiffs, they having chosen not to agree to his indecent and unbecoming behaviour and harassment towards the first plaintiff."

Similarly, at the end of Para-6 it is contended that the plaintiffs with great difficulty have been able to disclose the particulars of the investments which the defendant has surreptitiously secreted and reserved their right to add other additional investments and securities that are belonging to the HUF as and when particulars thereof are known to the plaintiffs. In view of reserving right to add the other investments and deposits, the plaintiffs are entitled to claim relief since the other investments and deposits were not within their knowledge.

The main ground urged before this Court is that there is a direct intradict on exercising power under Order VI Rule 17 to grant leave to the parties to amend their pleadings after amendment to CPC into by Act 22 of 2002 which disable the Courts to exercise unfettered discretion in allowing applications filed under Order VI Rule 17 of CPC. But prior to amendment, the courts used to order amendment petitions in a routine manner but after amendment their power is restricted.

In Salem Advocate Bar Association, Tamil Nadu v. Union of India[1], the Hon'ble Apex Court considered the scope of the validity of amendment by incorporating proviso to Order VI Rule 17 and concluded that the proviso is added to Order VI Rule 17 only to prevent unnecessary amendment and created fetter on the power of the court to grant leave to amend the plaint to some extent, the petitions filed under Order VI Rule 17 of CPC, therefore, the intention of the legislature in incorporating proviso to Order VI Rule 17 is to prevent unnecessary and belated amendments, but it is not an absolute bar even according to proviso to Order VI Rule 17, the Court can permit such amendments even after commencement of the trial, if the petitioners are able to satisfy the court that despite exercise of due diligence such facts could not be brought to the notice of the court, by amending the plaint what is required under the proviso is 'exercise of due diligence' if trial has been commenced.

There is a controversy regarding commencement of trial and what is the exact date of commencement of trial is a question to be decided. In some of the judgments, more particularly, in **Baldev Singh v. Manohar Singh**[2], **Rafeeq Ahmed v. Hameed Ahmed Khan and others**[3], **Perim Janardhana Rao Vs. Mallepati Balaji and others**[4] and **Ontipalli Surya Venkata Satya Prasada Rao Vs.**

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[1] (2005) 6 Supreme Court Cases 344
[2] LAWS (SC)-2006-8-5
[3] 2006 (3) ALD 660
[4] 2015(2) ALT Page 649

Gangumalla Suryakantham and others[5], in **Baldev Singh's** case (2 supra) the Apex Court in Para 11 held that "from the order passed by the learned trial Judge it is evident that the respondents had not been able to fulfill the said three conditions, the question therefore which arises for consideration is as to whether trial has commenced or not." In our opinion the date on which issues were framed is the date of first hearing. Provisions of Code of Civil Procedure envisages taking of various steps in two stages of the proceedings. Filing of an affidavit in lieu of examination in chief of the witness in our opinion would amount to commencement of the proceedings. In **Kailash Vs. Nanhku and others**[6], **and Vidyabhanu Vs. Padmalatha and others**[7] the Supreme Court consistently held that the date of framing of issues is the date of commencement of trial and question of filing documents would not arise after amendment of CPC in 2002, therefore, the contention that the trial has not been commenced since the witnesses were not examined is contrary to the full bench judgment of the Apex Court in **Kailash case** referred supra. If the principle laid down to the **Kailash case** is applied to the present facts of the case, the trial is already been commenced and mere granting adjournment to examine the witness would amount to postponing the trial though it already commenced. In such a

[5] 2016(4) ALT Page 589
[6] 2012(4) SCC 480
[7] 2009(4) SCC Page 409

case, it is imperative on the part of the respondent to satisfy the court that despite exercise of due diligence the petitioners/plaintiffs could not bring those facts to the notice of the court. Here, as per the allegations made in the plaint in paras - 4 and 6 despite exercise of due diligence they could not collect the information relating to deposits and investments made by HUF and reserved their right to add the deposits and investments and securities lying in deposits when ever such information is collected. These allegations which I extracted in the earlier paras would disclose that they made honest attempts to collect the information about the deposits, securities, investments etc. made by the HUF. But they could not collect information and thereby reserved their right to include various items of the property, which came to the notice of the plaintiffs. This itself is self-explanatory to conclude that the respondents herein made sincere and honest attempt and despite it, they could not bring those facts to the notice of the court at appropriate stage. But for the first time, they came to know about the deposits lying in banks only when the documents are marked in O.P.No.131 of 2006, therefore, they filed the present petition seeking leave of the court to amend the plaint schedule by invoking Order VI Rule 17 as the respondents could satisfy the Court about their exercise of due diligence despite it they failed to include those items of the property to the schedule annexed to the plaint and thereby the intradict contained in Order VI Rule 17 would not come in the way of trial court to grant leave to the petitioners/plaintiffs to amend the plaint schedule by adding those items of the property. If for any reason these properties are not included in the schedule, since it is a suit for partition, the entire suit would fail. Therefore, it is necessary to amend the plaint so as to enable the parties to place all the properties before the Court.

The power under Order VI Rule 17 of CPC is subject to the proviso annexed thereto and according to Order VI Rule 17 of CPC, the amendment can be allowed by the Court at any stage of the proceedings either party to alter or amend their pleadings in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Thus, the court can permit either of the parties to amend their pleadings if those pleadings are necessary to decide the real controversy, but subject to the proviso annexed there to. In **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**[8], **Rameshkumar Agarwal v. Rajmala Exports Pvt. Ltd and ors**[9] the Apex Court laid down the principles to be followed for grant of leave in a petition filed under Order VI Rule 17. The principle laid down in **Revajuthu Builders and others(supra)** is reiterated in **Ramesh Kumar Agarwal's** case and the principle laid down in both the judgments is as follows:

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[8] 2009(8) SCJ 401
[9] AIR 2012 SUPREME COURT 1887

"On critically analyzing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the 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 bona fide or mala fide?

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 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.

Keeping in mind the above guidelines, this Court has to decide whether the amendment is necessary for proper adjudication of the case, the suit or proceeding pending before the court and whether it is bona fide or mala fide, and so also the prejudice, bar of limitation, change the nature and character of the suit. In the present case the suit was filed for partition and unless all the properties owned and possessed by the joint family are included in the schedule, the suit is not maintainable. Therefore, addition of properties shown in the schedule annexed to the petition is necessary for complete and effective adjudication of the dispute between the parties. At the same time, the plaintiffs/respondents herein themselves reserved their right to add some of the investments and deposits made by HUF as those deposits were not within their knowledge and finally no prejudice would be caused to the present petitioner and it would not change the nature and character of the suit since the claim for partition remained unchanged or unaltered. Therefore, even if the principles laid down in the above judgments are applied to the present facts of the case, the present amendment is liable to be allowed. In any view of the matter, the proposed amendment would not take away the valuable right accrued to the respondents and does not amount to withdrawal of any admission made in the pleading by the respondents/plaintiffs. In such a case, the court can exercise discretion in favour of the respondents herein by allowing the application under Order VI Rule 17.

All the contentions raised by the learned counsel for the petitioner before this Court are that there is no basis for the amendment and mere production of details before the Judge, Family Court in O.P.No.131 of 2006 would not give raise to any cause of action for filing the petition and unless there is satisfactory material to establish that those deposits relate to HUF, the petition cannot be allowed. But, this contention is without any merit in view of the law declared by this Court in **A. Krishna Rao v. A. Narahari Rao and others**[10] **and Rajesh Kumar Aggarwal and others v. K.K. Modi and others**[11] in both the judgments this Court and Apex Court held that the

[10] 2015 (1) ALT 113
[11] 2006 (3) ALT 50 (SC)

parties can be permitted to raise inconsistent pleas and inconsistency will not come in the way of the Court to order petition filed under Order VI Rule 17 and the merits of the proposed amendment cannot be decided in a petition filed under Order VI Rule 17. Therefore, the contentions of the petitioner's counsel Smt.Pramada would not stand to any legal scrutiny in view of the law declared by this Court and Apex Court referred supra.

The trial Court exercised its discretion that conferred on it by Order VI Rule 17 and the proviso to Order VI Rule 17 would not come in the way of the respondents/plaintiffs to seek leave to amend as they made honest and sincere attempts to collect the details of the deposits, investments etc. at the time of filing plaint as they could not collect complete details, they reserved their right to add the investments and deposits made by HUF to the plaint by filing appropriate application. This itself would indicate that the respondents-plaintiffs exercised their due diligence and despite it they could not bring these facts to the notice of this court by amending the plaint appropriately. Thus, the order passed by the trial Court would not suffer from any illegalities or irregularities warranting interference of this Court, as the trial Court exercised discretion properly keeping in mind the broad principles laid down by various courts including Apex Court and this Court.

In view of my foregoing discussion, the point is held in favour of the respondents and against the petitioner.

In the result, the revision petition is dismissed confirming the order passed by the trial Court in I.A.No.158 of 2014 in O.S.No.64 of 2006 dated 11.11.2016. No order as to costs.

M.SATYANARAYANA MURTHY, J

Dt:14-07-2017,
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