

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.6016 OF 2016

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.290 of 2016 in O.S.No.1 of 2007 dated 26.08.2016 passed by the Senior Civil Judge, Kovvur.

I.A.No.290 of 2016 filed by the petitioners under Order VI Rule 17 r/w Section 151 C.P.C, seeking leave of the Court to amend the boundaries of the plaint schedule properties. It is alleged that the petitioners filed suit against the respondent for declaration and recovery of vacant possession of Item No.1 of the schedule property to the first petitioner and Item Nos. 2 & 3 of the plaint schedule properties to the second petitioner by the respondents. Further, the petitioners were examined as P.Ws.1 and 2 and the matter was posted for further evidence. In the meanwhile, it was noticed by the counsel for the petitioner in the Trial Court that, by mistake and oversight the northern boundary in Item No.1 of the plaint schedule property is mentioned as 1st defendant's land to some extent. Therefore, sought leave of the Court to amend the plaint schedule.

The respondents filed counter denying material allegations, *inter alia*, contending that, at this stage, the leave cannot be granted in view of the bar under proviso to Order VI Rule 17 C.P.C, since the Trial has already been commenced. That apart, it is contended that the petitioners did not plead exercise of due diligence and failure to satisfy the Court about exercise of due

diligence, they could not bring the facts to the notice of the Court and that amendment cannot be allowed to fill up the lacunas in the evidence of P.Ws 1 & 2.

The Trial Court passed an order under challenge without advertent to the contentions raised by the learned counsel, more particularly, with reference to proviso to Order VI Rule 17 C.P.C and exercise of due diligence by the petitioners. In the absence of such finding, which is a jurisdictional fact, granting leave to amend the plaint schedule is an error apparent on the face of record. Learned counsel for the petitioners before the Trial Court/respondents herein placed reliance on two judgments **Sajjan Kumar v. Ram Kishan**¹ and **Usha Devi v. Rijwan Ahmad and ors.**², wherein, the Apex Court allowed application for amendment recording its own reasons.

However, learned counsel for the respondents while placing reliance on the judgments in **Carona Ltd. v. Parvathy Swaminathan & Sons**³, **Vidyabai and others v. Padmalatha and another**⁴ and **P.A. Jayalakshmi v. H. Saradha and others**⁵ wherein, the Supreme Court dealt the same aspect with reference to Order VI Rule 17 C.P.C.

In paragraph 19 of **Vidyabai**⁴ case, the Supreme Court held 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. Only if such a condition is fulfilled, the amendment is to be allowed. However, proviso appended to Order 6 Rule 17 of the code restricts the power of the Court. It puts an

¹ (2005) 13 Supreme Court Cases 89

² AIR 2008 SUPREME COURT 1147

³ (2007) 8 Supreme Court Cases 559

⁴ (2009) 2 Supreme Court Cases 409

⁵ (2009) 14 Supreme Court Cases 525

embargo on exercise of its jurisdiction. The Court's jurisdiction, in a case of this nature is limited. Thus, unless the jurisdictional fact, as envisaged therein, is found to be existing, the Court will have no jurisdiction at all to allow the amendment of the plaint.

In **P.A. Jayalakshmi**⁵ case, the Apex Court had drawn distinction between proviso to Order VI Rule 17 C.P.C and Order VIII Rule 9 C.P.C i.e. amendment of pleadings and subsequent pleadings and concluded that, in view of the proviso to Order VI Rule 17 C.P.C, the amendment cannot be allowed.

Learned counsel also placed reliance on judgments of this Court rendered in **Muthukur Gram Panchayat, SPSR Nellore District v. Kakuturu Ramesh Reddy and others**⁶, **B. Sreenivasulu v. B. Kusuma Kumari and others**⁷ and **Molli Eswara Rao v. Kurcha Chandra Rao**⁸.

In all the judgments, the law declared by the Apex Court and this Court is clear that, according to proviso to Order VI Rule 17 C.P.C, it is incumbent and obligatory on the part of the person applying to show that despite exercise of due diligence, such application could not be filed before commencement of trial. In the present case, the Trial has already been commenced and the evidence is adduced.

But, this Court while exercising power under Article 227 of the Constitution of India cannot express its opinion, since the Trial Court did not advert to the contention urged in the counter with reference to proviso to Order VI Rule 17 C.P.C. In such case, it is a fit case to remand the petition to the Trial Court to record its

⁶ 2014 (1) ALD 444

⁷ 2016 (6) ALD 120

⁸ 2016 (3) ALD 510

findings as to the requirement under the proviso to Order VI Rule 17 C.P.C and decide the same in accordance with law, after affording reasonable opportunity to both the parties, taking into consideration the facts of the case, as the law declared by this Court is regarding jurisdictional fact and adjudicatory fact. Hence, the order passed in I.A.No.290 of 2016 in O.S.No.1 of 2007 dated 26.08.2016 passed by the Senior Civil Judge, Kovvur, is set-aside, as the order is silent as to the requirement of proviso to Order VI Rule 17 C.P.C, though such contention is raised in the counter by the learned counsel for the respondents before the Trial Court.

In the result, the civil revision petition is allowed, setting aside the order I.A.No.290 of 2016 in O.S.No.1 of 2007 dated 26.08.2016 passed by the Senior Civil Judge, Kovvur, and remanded the matter to the Trial Court to decide the petition afresh, after affording reasonable opportunity to both the parties, advertent to various contentions raised by both the parties in their pleadings, within a period of one month from the date of receipt of copy of this order.

Consequently, miscellaneous applications pending if any, shall also stand closed. No costs.

JUSTICE M. SATYANARAYANA MURTHY

Date:20.07.2017

SP