

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.3597 OF 2011

ORDER:

This civil revision petition is filed under Article 227 of the Constitution of India, challenging the order in I.A.No.1008 of 2010 in O.S.No.694 of 2009 dated 19.04.2011 passed by the Additional Senior Civil Judge, Tirupati, dismissing the application filed under Order VI Rule 17 r/w Section 151 C.P.C and Rule 28 of Civil Rules of Practice to amend the written statement filed by the petitioner.

The petitioner filed I.A.No.1008 of 2010 under Order VI Rule 17 C.P.C, alleging that the respondent filed O.S.No.694 of 2009 for recovery of amount due under the promissory note which was executed by her deceased husband, who was an illiterate and by that time, he was working as P.H. worker in Tirupati Municipal Corporation. But, it is stated by the petitioner in the affidavit in I.A.No.1008 of 2010 that the respondent was utter stranger to his family and the petitioner is not aware whether the alleged promissory note was executed by her husband in favour of the respondent even during the lifetime of her husband. Further, it is stated that the respondent neither approached the petitioner nor issued any legal notice and that the alleged promissory note did not disclose neither the names of the scribe nor the signature of attestors and further, she has no necessity to borrow any amount from the respondent and contended that the promissory note was fabricated and forged. It is averred in the affidavit filed by the petitioner that, she came to know that the respondent not only sued this petitioner, but also others for wrongful gain and due to

lack of time, as per the amended provisions of C.P.C, the petitioner was unable to file detailed written statement and counter. Hence, the petitioner filed I.A.No.1008 of 2010 seeking leave of the Court to amend the written statement.

The respondent filed counter in I.A.No.1008 of 2010 denying material allegations, *inter alia* contending that, in view of the bar under the amended Civil Procedure Code, the petitioner is not entitled to seek leave of the Court to amend the written statement, unless the petitioner satisfied that, inspite of exercise of due diligence, the petitioner could not raise those pleas before the Court.

Upon hearing argument of both the counsel, the Trial Court dismissed I.A.No.1008 of 2010 on the ground that the trial has already commenced and when the trial is commenced, in view of bar as per the proviso to Order VI Rule 17 C.P.C, parties cannot be permitted to amend their pleadings.

Aggrieved by the order in I.A.No.1008 of 2010 in O.S.No.694 of 2009 dated 19.04.2011 passed by the Additional Senior Civil Judge, Tirupati, the present civil revision petition is filed, mainly on the ground that the proposed amendment is to be allowed liberally when the trial has not been completed. Apart from that, when a specific plea is raised by way of amendment, i.e. use of coercion, which was not earlier raised is a ground to permit the petitioner to amend the written statement and prayed to set-aside the order passed by the Court below, as it is illegal.

During hearing, learned counsel for the petitioner reiterated the grounds urged in the petition, while learned counsel for the respondent supported the order of the Court below in all respects.

As seen from the order under challenge, the petitioner filed her written statement and issues were framed and suit was posted for trial on 04.08.2010. The affidavit of P.W-1 in lieu of examination in chief was filed on 06.09.2010 and Ex.A-1 was also marked, but did not cross-examine the witness and filed the present petition after commencement of trial, on the ground that the trial has already commenced, the Court below dismissed I.A.No.1008 of 2010, negating leave to amend the written statement.

A pre-trial amendment can be liberally allowed, but when trial is commenced, unless the petitioner explains the reason that, inspite of exercise of due diligence, he could not raise such plea before commencement of trial, the petitioner is not entitled to claim relief, in view of the bar under proviso to Order VI Rule 17 C.P.C, as amended by Act 22/2002. But, here, the affidavit is totally silent as to exercise of due diligence and no reason is assigned, except making allegations and in view of the amended provisions of C.P.C, the petitioner filed written statement without raising sufficient pleas. But, that is not sufficient to conclude that the petitioner exercised due diligence in prosecuting the proceedings.

The words “due diligence” is not exactly defined in the Code, but in “***Bharat Petroleum Corporation Ltd. v. Precious Finance Investment Pvt. Ltd***¹”

“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

¹ 2006 (6) BomCR 510

relative facts of the special case." Similarly the Law Lexicon by 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***"² 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 'due diligence' referred supra in the judgment of Bombay High Court and Apex Court, to claim relief of amendment, the petitioner has to prove that she has acted as an ordinary reasonable prudent man and it is a question of fact. It is for her to explain the reason for failure to take steps earlier.

² (2008) 5 Supreme Court Cases 117

There is nothing on record to prove that the petitioner has exercised due diligence throughout the trial before the Court or atleast after filing of suit, till the date of filing of the present petition

The intention of the Legislature in incorporating Order VI Rule 17 C.P.C is to avoid multiplicity of litigations, permitting the parties to amend their pleadings appropriately.

The Court can exercise its discretion in view of the law declared by the Apex Court in **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**³, wherein the Apex Court laid down certain guidelines for granting or denying relief under Order VI Rule 17 of CPC viz., as follows:

“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.

These are some of the important factors which may be kept in mind while dealing with application filed under Order VI Rule 17. These are only illustrative and not exhaustive.

³ 2009(8) SCJ 401

It is clear that while deciding the application for amendment ordinarily the court must not refuse bona fide, legitimate, honest and necessary amendments and should never permit mala fide and dishonest amendments. The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.

24. The Apex Court further held that,

"amendment application to be filed if necessary immediately after filing suit i.e. before commencement of trial. If the petitioners are able to prove or explain as to how they failed to take steps before the trial commenced despite exercising due diligence, the Court can allow such amendment. The factum of exercising due diligence depends upon circumstances."

Similarly, in **Rajkumar Guruwara**² case, the Apex Court laid down the following conditions to grant application for amendment subject to certain conditions:

- (i) when the nature of it is changed by permitting amendment;
- (ii) when the amendment would result in introducing new cause of action and intends to prejudice the other party;
- (iii) when allowing amendment application defeats the law of limitation.

In view of the law declared by the Apex Court in the judgment referred supra, as the trial has already commenced and P.W.1 was examined-in-chief, the trial is deemed to have been commenced and completed partly. The petitioner failed to satisfy that she exercised due diligence in prosecuting the proceedings, inspite of it, failed to raise such plea earlier to commencement of trial. Therefore, this Court cannot reverse the order in I.A.No.1008

of 2010 in O.S.No.694 of 2009 dated 19.04.2011 passed by the Additional Senior Civil Judge, Tirupati, as the order is based on sound reasoning.

Even otherwise, the power of this Court under Article 227 of the Constitution of India is limited and the Apex Court in **Rajkumar Bhatiya v Subhash Chander Bhatiya**⁴ wherein the scope of interference under Article 227 has been highlighted relying on the earlier judgment of Apex Court in **Sadhana Lodh v. National Insurance Company**⁵ and held that the High Court does not act as an appellate Court and it is not open to it to review or re-assess the evidence upon which the inferior Court or Tribunal has passed an order.

In view of my foregoing discussion, I find no error, muchless, a legal infirmity warranting interference of this Court by exercising power under Section 227 of the Constitution of India to set-aside the order passed by the Court below and the present civil revision petition is liable to be dismissed.

In the result, the civil revision petition is dismissed.

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

JUSTICE M. SATYANARAYANA MURTHY

Date:27.02.2018

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⁴ 2017(14) Scale 355

⁵ AIR 2003 SC 1561