

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

CRP No.2153 of 2014

ORDER:

This Civil Revision Petition is filed questioning the order dated 24.03.2014 passed in IA No.557 of 2013 in OS No.223 of 2011 by the VIII Additional District and Sessions Judge, Vijayawada.

The application was filed by the defendant for amendment of a written statement that is filed in the suit OS No.223 of 2011. The plaintiff filed a suit for recovery of money stating among other things that a demand draft of Rs.10,000/- was given by the defendant as part payment of the amount due and the same was sent by speed post along with a covering letter. The covering letter, which is styled as a 'debt acknowledgment letter' dated 07.06.2011 along with the postal cover, is filed as a document No.4. A Photostat copy of the demand draft dated 07.06.2011 is filed as document No.5. The facts relating to this demand draft, letter etc., are pleaded in para-4 of the plaint.

In reply thereto, the defendant filed a written statement clearly denying that the demand draft is created and fabricated for the purpose of the suit. It is also mentioned in para-3 of the written statement that

the plaintiff did not send any notice and the defendant did not receive any notice from the plaintiff. Thereafter, an issue was framed to the following effect:

“whether the defendant sent Rs.10,000/- by way of demand draft to the plaintiff?”

The trial commenced and PW.1 was also cross-examined by the defendant. Thereafter, the defendant filed chief affidavit and at the stage of cross-examination, the present application was filed for amendment of the written statement to include a specific para which is to the effect that “the letter dated 07.06.2011 was never executed by the defendant”. The defendant wanted to plead that the letter is created and fabricated for the purpose of the suit. This application was allowed despite objections raised by the respondent/present revision petitioner in his counter. Questioning the same, the present revision is filed.

This Court has heard Sri G. Madhusudhan Reddy, learned counsel for the revision petitioner/plaintiff and Sri M.A.K. Mukheed, learned counsel for the respondent/defendant.

The revision petitioner argued that the application is filed after the plaintiff's evidence is closed and the chief examination of the defendant was also over. The revision

petitioner also urged that there is no need for amendment of the written statement, as the defendant has already mentioned that the letter dated 07.06.2011 is created and fabricated for the purpose of the suit. In ground No.5 of the grounds of revision, this fact is clearly mentioned.

After considering the submissions made by the both sides, the basic point that arises in this case is whether the amendment of written statement is really necessary in the facts and circumstances of the case?

The learned counsel for the revision petitioner relied upon ***Vidyabai v. Padmalatha***¹ wherein the Lordships of the Hon'ble Supreme Court of India have clearly held that the power to amend a pleading is not an unrestricted power. Order VI Rule 17 CPC contains the proviso, which restricts the power of the Court in the exercise of its jurisdiction. In the opinion of the Hon'ble Supreme Court that in view of the proviso to Order VI Rule 17 CPC, it must be established that the amendment is necessary and that despite the exercise of due diligence, a party could not have raised the matter before the commencement of the trial. Para-19 of the judgment of the Hon'ble Supreme Court is reproduced as under:

¹ (2009) 2 SCC 409

“19. It is the primal 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 VI, Rule 17 of the Code restricts the power of the court. It puts an 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.”

Therefore, in post-trial amendments, the first and foremost fact that has to be established is that despite the exercise of due diligence, the party could not raise this plea earlier when the pleading is filed. Unless and until the jurisdictional fact is clearly established, the question of allowing the application for amendment cannot arise. The party seeking an amendment must plead and prove, despite the exercise of due diligence he/she could not raise this plea earlier. If the present case is viewed against the backdrop of the settled legal position, the fact remains that the application in the present case is filed after the plaintiff's evidence was closed and the defendant's evidence was commenced in the sense that the defendant filed the chief affidavit.

A reading of the entire affidavit filed in IA No.557 of 2013 does not anywhere either use the word 'due diligence' or plead the same with certainty. Para-8 of the

affidavit, filed in support of the application for amendment merely states that due to “oversight”, the specific plea about the letter dated 07.06.2011 was not taken. Nothing else is mentioned.

As mentioned earlier in the order, the demand draft, the covering letter etc., are pleaded and filed along with the plaint. No explanation is given as to the foundational fact of due diligence, which is required to be fulfilled, in view of the proviso to Order VI Rule 17 CPC. In view of the law, it is the categorical duty of the lower Court to consider whether this jurisdictional fact has been established or not. This Court is of the opinion that the exercise of the discretion by the lower Court in allowing the amendment only on the ground that it is necessary for determination of the case is not correct. The Court has lost sight of the fact that the amendment in this case is a post-trial amendment. Therefore, the necessary factors for a post-trial amendment have to be brought out with sufficient clarity. The exercise of due diligence is a matter which is extremely within the knowledge of the deponent of the affidavit. It is therefore necessary for the defendant to bring out the details and also clarify why, despite the exercise of due diligence the facts could not be mentioned. After the exercise of due diligence if

something was overlooked, it can be introduced by amendment, but unless and until the aspect of due diligence is established with clarity, the Court does not have the jurisdiction to allow a post-trial amendment.

In the facts and circumstances of the case, this Court is of the opinion that the lower Court overlooked this fundamental aspect and the order dated 24.03.2014 under revision is therefore set aside. The Civil Revision Petition is accordingly allowed. There shall be no order as to costs.

As the suit is of the year 2011, the lower Court is directed to proceed with the trial quickly and not to be liberal in grant of adjournments. Needless to say that the lower Court should proceed for disposal of the suit without in any being influenced by what is stated in this order.

Miscellaneous Petitions, if any, pending in this revision, shall stand closed.

D.V.S.S. SOMAYAJULU, J

Date: 27.11.2018
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