

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.1086 of 2018

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, by the unsuccessful petitioners – plaintiffs, is directed against the order, dated 21.09.2017, of the learned Principal Junior Civil Judge, Kandukur, passed in I.A.No.481 of 2015 in O.S.No.98 of 2009.

2. I have heard the submissions of *Ms. Nimmagadda Revathi*, learned Counsel for the petitioners – plaintiffs ('plaintiffs', for short) and of *Sri S.Venkateswarlu*, learned Counsel for the respondents – defendants ('defendants', for short). I have perused the material record.

3. The facts, which are necessary to be stated as prelude to the order, in brief are as follows:

The plaintiffs filed the suit against the defendants for declaration of title and perpetual injunction in respect of Ac.0.05 cents bearing Door No.8-488 in Survey No.698 of Somarajupalli Village, as described in the schedule annexed to the plaint. The defendants are resisting the suit. After commencement of the trial in the suit, the plaintiffs filed the aforestated Interlocutory Application under Order VI Rule 17 read with Section 151 of the Code of Civil Procedure ('the Code', for short), requesting for permission to amend the plaint to enable them to seek the relief of recovery of possession of the suit schedule property instead and in the place of relief of

perpetual injunction, apart from the relief of declaration of title, which is already sought. The defendants filed the counter affidavit and resisted the application. By the order impugned in this Civil Revision Petition, the trial Court dismissed the said application of the plaintiffs. Therefore, the plaintiffs are before this Court.'

4. The case of the plaintiffs and the submissions made on their behalf in brief are as follows:

The plaintiffs have got right, possession and enjoyment over the suit schedule property. The first plaintiff got removed the thatched house in the plaint schedule property and constructed a house with asbestos roof. Recognizing her possession and enjoyment, the Gram Panchayat assessed the property to tax. The plaintiffs also obtained electricity service connection. The Government also issued DK patta in favour of the first plaintiff in the year 2006 recognizing her possession and enjoyment over the plaint schedule property. While so, with a view to grab the said property, the defendants hatched a plan, manipulated some fake documents and filed O.S.No.167 of 2007 on the file of the trial Court and sought delivery of possession of the suit schedule property from the first plaintiff, claiming as if they are the owners of the same. Unfortunately, the first plaintiff remained *ex parte* in the said suit and an *ex parte* decree was passed. The defendants herein, having filed the Execution Petition pursuant to the *ex parte* decree in the said suit, took delivery of possession of the property through

Court. Since the plaintiffs already filed the instant suit for declaration and perpetual injunction, and as the possession of the property was delivered during the pendency of the suit, pursuant to the decree in O.S.No.167 of 2007, it has become necessary to seek recovery of possession/redelivery of possession of the suit schedule property from the defendants. Therefore, the amendment of plaint is sought to enable the plaintiffs to claim recovery of possession of the suit schedule property, apart from the relief of declaration of title.'

5. The case of the defendants and the submissions made on their behalf are as follows:

'The material allegations in the affidavit of the first plaintiff filed in support of the petition are false. The defendants filed O.S.No.167 of 2007 on the file of the trial Court for delivery of the suit schedule property. The first plaintiff remained *ex parte* and did not contest the suit. The suit was decreed *ex parte*; thereafter, E.P.No.73 of 2008 was filed; and, possession of property was obtained through Court, on 22.11.2014. The written statement was filed submitting the true facts, whereas the plaintiffs herein suppressed the facts from the Court. The applications under Section 5 of the Limitation Act and under Order IX Rule 13 of the Code filed by the plaintiffs for setting aside the *ex parte* decree passed in the above suit were dismissed. The plaintiffs could not explain any reasons for not bringing to the notice of the Court about the former suit. And the present amendment is being sought belatedly after six years

of the *ex parte* decree and several long years after the delivery of possession pursuant to the *ex parte* decree in the former suit. The plaintiffs were not diligent in prosecuting their suit. The trial in the suit has already commenced. Hence, the amendment sought cannot be allowed.'

6. Learned Counsel for the plaintiffs, apart from reiterating the pleaded case and the above-stated facts, which are excerpted supra, would further submit that, after the dismissal of the applications filed for condonation of delay and setting aside the *ex parte* decree, steps are being taken to assail the *ex parte* decree by filing an appeal before an appropriate forum; that the instant suit, being a comprehensive suit for declaration of title, and the former suit being only one for recovery of possession, the rights of the parties have to be determined in the present comprehensive suit, despite the *ex parte* decree passed in the former suit; the validity of the said decree can also be considered in the present suit; in any view of the matter, the merits of the proposed amendment cannot be gone into while dealing with an application seeking amendment; as per settled law, the plaintiffs who are seeking the relief of declaration of title are entitled to convert the suit into one for recovery of possession by seeking the proposed amendment; merely on the ground of delay, the amendment cannot be refused; and, if the amendment is allowed, it would minimize the litigation and would be helpful in effectively adjudicating the *lis* and setting at rest the disputes once for all.

She placed reliance on the decision of this Court in **M.Kamalamma v. B.Doraswamy Reddy**¹, in support of her contentions.

7. Learned Counsel for the defendants, while reiterating the pleaded case of the defendants, which is extracted supra, and while supporting the orders of the Court below would further contend that, this is not the first round of litigation and that, since the present suit is the second round of litigation, the amendment cannot be permitted, more particularly, when it is sought belatedly and after commencement of the trial.

8. I have given earnest consideration to the facts and submissions.

9. The summary of facts is this: The plaintiffs who filed the suit for declaration of title and perpetual injunction are now seeking amendment of the plaint in so far as the relief of perpetual injunction to enable them to seek the relief of recovery of possession instead of the relief of perpetual injunction, as admittedly, their possession as on the date of the suit was disturbed and delivery of possession of the subject property was obtained from them by the defendants during the pendency of the instant suit i.e., on 22.11.2014, pursuant to the *ex parte* decree, which the defendants obtained in the former suit. Therefore, the amendment is being sought based on a subsequent event. However, the defendants are resisting the

¹ 2018 (1) ALD 634

request of the plaintiffs for amendment of the plaint, *inter alia*, stating that, if the amendment is allowed, it changes the nature and character of the suit and causes prejudice to them and that the amendment, which is being sought belatedly after the commencement of the trial, is impermissible.

10. In the considered view of this Court, the question involved in this revision is no longer *res integra* in view of the settled legal position.

10.1 Firstly, coming to the contention that the amendment of the plaint is being sought belatedly and is impermissible in view of the bar contained in the proviso to Order VI Rule 17 of the Code, it is profitable to refer to the said proviso, which reads as follows:

“Proviso to Order VI Rule 17 of the Code:

“Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that inspite of due diligence, the party could not have raised the matter before the commencement of trial.”

10.2 Now, it is apt to refer to the relevant precedents. In ***Vidyabai Vs. Padmalatha***² the Supreme Court observed that proviso to Order VI Rule 17 of the Code is couched in a mandatory form and, therefore, the court’s jurisdiction to allow an application for amendment is taken away thereunder unless the conditions precedent therefor are satisfied and that before allowing amendment, the Court must come to a conclusion that

² (2009) 2 SCC 409

in spite of due diligence, the parties could not have raised the matter before the commencement of the trial and that it is the primary duty of the Court to decide as to whether such an amendment is necessary to decide the real controversy between the parties and that only if such a condition is fulfilled, the amendment is to be allowed. Thus, the proviso appended to Order VI Rule 17 of the Code was held to restrict the power of the Court and that it placed an embargo on exercise of its jurisdiction and that unless the jurisdictional fact as envisaged therein is found to exist, the court would have no jurisdiction at all to allow the amendment.

10.3 In *Revajeetu Builders Vs. Narayana Swamy*³, on an analysis of English and Indian case law, the Supreme Court carved out the following principles which should weigh with the Court while dealing with an 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 changes the 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.**

³ (2009) 10 SCC 84

The Supreme Court, however, clarified that the above principles were illustrative and not exhaustive.

10.4 In ***Chander Kanta Bansal Vs. Rajinder Singh***⁴, the Supreme Court, taking note of the fact that 'due diligence' has not been defined in the Code, referred to the dictionary meaning of 'diligence' which is to the effect that it means careful and persistent application or effort or a continual effort to accomplish something; care; caution; the attention and care required from a person in a given situation, and observed that '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. Reference was also made to 'Words and Phrases' by Drain-Dyspnea (Permanent Edition 13-A) wherein 'due diligence' was defined in law to mean doing everything reasonable and not everything possible. The Supreme Court, therefore, concluded that 'due diligence' would mean reasonable diligence and would mean such diligence as a prudent man would exercise in the conduct of his own affairs.

10.5 Further, in the decision in ***Abdul Rehman and another Vs. Mohd. Ruldu and others***⁵, the Supreme Court, having taken note of the above provision of law had laid down that it is clear that the parties to the suit are permitted to bring forward amendment of the pleadings at any stage of the proceeding for

⁴ (2008) 5 SCC 117

⁵ 2013 (1) ALD 1 (SC)

the purpose of determining the real question in controversy between them and that the Courts have to be liberal in accepting the same, if such application for amendment is made prior to the commencement of the trial and that if such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that, in spite of due diligence, the party could not have raised the matter before the commencement of the trial. In the above decision, the Supreme Court reiterated the following proposition:

“All amendments which are necessary for the purpose of determining real questions of 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.”

In the above decision, the Supreme Court further referred to the ratio in the decision in *Pankaja and another Vs. Yellapa*⁶, which runs as follows:

“If the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed.”

In this cited case, the facts are as under: “As per the case of the plaintiffs, the defendant, in violation of the Court order, had further encroached into the suit property. Therefore, the plaintiffs sought for the amendment of the plaint for seeking the reliefs of declaration of ownership and possession of the said encroached area also. The said application was allowed by the

⁶ AIR 2004 SC 4102

trial Court. However, the Principal Civil Judge rejected the application for amendment on the ground that the application for amendment was filed at a belated stage. The High Court dismissed the revision on the said ground and also on the ground that the amendment introduces a different relief than what was originally asked for. The Supreme Court permitted the amendment by allowing the appeals.

10.6 In *Sampath Kumar Vs. Ayyakannu and another*⁷ the facts and ratio are as under: “A suit was brought in the year 1988 for perpetual injunction in respect of an agricultural land. Before the commencement of the trial in the year 1999, the plaintiff moved the application for amendment of the plaint alleging that during the pendency of the suit, the defendant had forcibly dispossessed the plaintiff in the year 1989. On such averments the plaintiff sought for the relief of declaration of title to the suit property and consequential relief of recovery of possession. The defendant opposed the application of the plaintiff stating that he had perfected title to the property by adverse possession and that the suit is barred by law of limitation and that a valuable right that had accrued to the defendant is being sought to be taken away by proposed the amendment. The trial Court rejected the application for amendment observing that the appropriate course for the plaintiff was to bring a new suit. The High Court maintained the said order. The Supreme Court while allowing the appeal of

⁷ (2002) 7 SCC 559

the plaintiff had referred to its earlier decisions and had finally held as follows:

In *Rukhmabai v. Lala Laxminaraya and Ors.*: [1960]2SCR253, this Court has taken the view that where a suit was filed without seeking an appropriate relief, it is a well settled rule of practice not to dismiss the suit automatically but to allow the plaintiff to make necessary amendment if he seeks to do so.

Order 6 Rule 17 of the CPC confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings and on such terms as may be just. Such amendments as are directed towards putting-forth and seeking determination of the real questions in controversy between the parties shall be permitted to be made. The question of delay in moving an application for amendment should be decided not by calculating the period from the date of institution of the suit alone but by reference to the stage to which the hearing in the suit has proceeded. Pre-trial amendments are allowed more liberally than those which are sought to be made after the commencement of the trial or after conclusion thereof. In former case generally it can be assumed that the defendant is not prejudiced because he will have full opportunity of meeting the case of the plaintiff as amendment. In the latter cases the question of prejudice to the opposite party may arise and that shall have to be answered by reference to the facts and circumstances of each individual case. No strait-jacket formula can be laid down. The fact remains that a mere delay cannot be a ground for refusing a prayer for amendment.

An amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent while permitting an amendment to direct that the amendment permitted by it shall not relate back to the date of the suit and to the extent permitted by it shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed. (See observations in *Siddalingamma and Anr. v. Mamtha Shenoy*: AIR 2001 SC 2896).

In the present case the amendment is being sought for almost 11 years after the date of the

institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment. However, the defendant is right in submitting that if he has already perfected his title by way of adverse possession then the right so accrued should not be allowed to be defeated by permitting an amendment and seeking a new relief which would relate back to the date of the suit and thereby depriving the defendant of the advantage accrued to him by lapse of time, by excluding a period of about 11 years in calculating the period of prescriptive title claimed to have been earned by the defendant. The interest of the defendant can be protected by directing that so far as the reliefs of declaration of title and recovery of possession, now sought for, are concerned the prayer in that regard shall be deemed to have been made on the date on which the application for amendment has been filed.

10.7 In *North Eastern Railway Admn. Vs. Bhagwan Das*⁸,

the Supreme Court held as follows:

“Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In *Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil* [AIR 1957 SC 363] which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the

⁸ (2008) 8 SCC 511

amendment would cause him an injury which could not be compensated in costs.”

10.8 The Supreme Court in *Baldev Singh Vs. Manohar*

*Singh*⁹ held as follows:

“Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion to the court to allow an amendment of the written statement at any stage of the proceedings.”

10.9 The Supreme Court, having referred to a three-judge

Bench decision in *Sajjan Kumar Vs. Ram Kishan*¹⁰, held as

follows:

“Having heard the learned Counsel for the parties, we are satisfied that the appeal deserves to be allowed as the trial court, while rejecting the prayer for amendment has failed to exercise the jurisdiction vested in it by law and by the failure to so exercise it, has occasioned a possible failure of justice. Such an error committed by the trial court was liable to be corrected by the High Court in exercise of its supervisory jurisdiction, even if Section 115 CPC would not have been strictly applicable. It is true that the plaintiff-appellant ought to have been diligent in promptly seeking the amendment in the plaint at an early stage of the suit, more so when the error on the part of the plaintiff was pointed out by

⁹ (2006) 6 SCC 498

¹⁰ (2005) 13 SCC 89

the defendant in the written statement itself. Still, we are of the opinion that the proposed amendment was necessary for the purpose of bringing to the fore the real question in controversy between the parties and the refusal to permit the amendment would create needless complications at the stage of the execution in the event of the plaintiff-appellant succeeding in the suit.”

11. It is pertinent to note that the amendment of the plaint in the instant suit is being sought to seek the relief of recovery of possession in the place of perpetual injunction, apart from the relief of declaration of title, which was already sought in the plaint. Therefore, the question is, whether such amendment of plaint, as sought for, can be permitted. In **Pankaja v. Yellappa** (6th supra), as already noted, the Supreme Court while holding that, though the plaint is initially filed for permanent injunction, there is no bar for permitting the amendment of the plaint to seek the relief of declaration of title in respect of plaint schedule property, had set aside the order of the trial Court rejecting the application seeking for amendment as confirmed by the High Court and had permitted the amendment holding *inter alia* that the question – ‘whether or not the suit seeking the relief of declaration is barred by limitation’ can be gone into in the main suit. The ratio in the above decision, on an analogy, applies to the facts of the present case. Therefore, in view of the peculiar facts of the case on hand, it cannot, at this stage, be said that the relief being sought to be claimed in the suit by way of proposed amendment is barred by law of limitation as the said question being a mixed question of fact and law, requires

determination by the trial Court after full-fledged trial. The view of this Court finds support from the decision in **Raghu Thilak D. John v. Rayappan and others**¹¹, wherein it was held that amendment of pleadings shall be allowed to avoid uncalled for multiplicity of litigation and that the dominant purpose of allowing amendment is to minimize litigation and the plea of limitation could be made a subject matter of the issue after allowing the amendment prayed for. Be it noted that in **Abdul Rehman**'s case (5th supra), the Supreme Court held as follows:

“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.”

Further, as per the ratios in the decisions of the Supreme Court in **Sampath Kumar**'s case (7th supra) and the decision in **Abdul Rehman**'s case (5th supra), the change in the nature of relief claimed shall not be considered as a change in the nature of the suit and the power of amendment should be exercised in the larger interest of doing full and complete justice between the parties. Therefore, it follows that the proposed amendment, if permitted, neither would introduce a fundamental or constitutional change in the nature and character of the suit nor would change the frame of the suit. The amendment was necessitated, admittedly, on account of a subsequent event, namely, delivery of possession of the subject property obtained during the pendency of the present suit from the plaintiffs through Court, pursuant to a decree in a former suit.

¹¹ AIR 2001 SC 699

12. Further, as per settled law, the merits of the proposed amendment cannot be gone into while considering an application filed for seeking amendment [See: **Sampath Kumar**'s case (7th supra)]. Further, all amendments which are necessary for the purpose of determining real questions of controversy between the parties should be allowed and which are necessary for effective adjudication of the *lis* and giving a quietus to the dispute between the parties, once and for all, can be permitted.

13. Having regard to the legal position obtaining and the reasons aforementioned, this Court holds that the amendment sought is *bona fide* and is permissible in the facts peculiar to the case and that therefore, there is acceptable merit in the request made by the plaintiffs for the amendment of the plaint and that the Court below is not justified in not permitting the plaintiffs to amend the plaint, and hence, the order impugned warrants interference.

14. In the result, the Civil Revision Petition is allowed and the order impugned is set aside. As a sequel, I.A.No.481 of 2015 in O.S.No.98 of 2009 is allowed. The Court below shall now permit the plaintiffs to carry out the amendment of the plaint as prayed for and file a neat copy of the plaint. On filing of such neat copy of the plaint, the Court below shall give the defendants an opportunity to file additional written statement to answer the averments in the amended plaint.

There shall be no order as to costs.

The miscellaneous petitions pending in this Civil Revision
Petition, if any, shall stand closed.

29.06.2018
vs

M.SEETHARAMA MURTI, J

