

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL REVISION PETITION No.1175 of 2018

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, by the unsuccessful petitioner–plaintiff, is directed against the order, dated 10.10.2017, of the learned Junior Civil Judge, Kanigiri, passed in I.A.No.695 of 2017 in O.S.No.32 of 2010.

2. I have heard the submissions of Sri V. Siva Prasad Reddy, learned Counsel for the petitioner, and of Sri L.J. Veera Reddy, learned counsel for the respondents. I have perused the material record.

3. The parties in this revision shall hereinafter be referred to as the plaintiff and defendants as arraigned in the suit.

4. The introductory facts, in brief, are as follows:

The plaintiff filed the suit against the defendants for perpetual injunction restraining the defendants and their men etcetera from interfering with the plaintiff's peaceful possession and enjoyment over the plaint 'B' schedule property, which is shown as 'CDEF' vacant site in the plaint plan, and for costs. The 1st defendant filed a written statement and is resisting the suit. A Commissioner, who was appointed, filed his report. Before commencement of trial, the plaintiff filed the instant Interlocutory Application before the trial Court for permission to amend the plaint to enable the plaintiff to seek the relief of declaration as regards 'CF' wall line with a width of 8 inches and length of about 65 feet and delivery of possession of the same after directing the defendants to remove the encroachments made in that site and to permit the plaintiff to have such constructions removed as per due process of law in the event the

defendants fail to remove the same. The said petition was resisted by the contesting defendants by filing a counter. On merits and by the orders impugned in this revision, the trial Court dismissed the said petition of the plaintiff. Hence, the plaintiff is before this Court.

5. The case of the plaintiff in support of the request for amendment of the plaint and the submissions made on his behalf, in brief, are as under:

In the plaint, relief of perpetual injunction was sought in respect of CDEF vacant site and the complex wall of the plaint schedule property apart from other reliefs. Originally, late Gadamsetty Venkata Subbamma, who is the wife of the plaintiff, purchased the plaint schedule property (vacant site) in an extent of 191 ½ Square Yards, for valuable consideration, from Kota Nagendram and others, under a registered sale deed, dated 14.03.1990. An old building of B.C.Venkata Subbaiah used to exist on the Western side of the vacant site; and, the same was shown as Western boundary in the registered sale deed. Later, it was demolished by the said owner. Both the said Venkata Subbaiah and the wife of this plaintiff wanted to construct business complexes in their respective vacant sites. Both Venkata Subbaiah and the plaintiff, on behalf of his wife, entered into a MOU; and, it was agreed that the said Subbaiah and the plaintiff's wife have to leave 4 ½ feet and 3 ½ feet of vacant sites respectively in between the proposed complexes for the purpose of passage and to reach Kota site from C.S. Puram Road on the North (shown as AB in the plaint plan). Accordingly, 3.6 feet is to be left by the wife of the plaintiff and to its further West 4.6 feet is to be left by the said Subbaiah making the total width of the passage 8 feet. The plaintiff's wife constructed the business complex shown as BC in the plaint plan, that is, GVS shopping complex, in an area of width of 11.7 feet by leaving 8 inches width of vacant site i.e., CDEF abutting the Eastern wall of the complex, that is, CF wall of the plaint plan. After construction of the said complex, the wife of

the plaintiff was in possession and enjoyment of the plaint A & B schedule properties, that is, ABCFGHI and CDEF vacant site & CF complex wall of the plaint plan, with absolute rights without any interference, till her death. The plaintiff's wife died intestate, on 09.06.2007. Thereafter, the plaint schedule property devolved upon her husband/the plaintiff and her sons. The sons are residing at Gudur and Madras and are eking out their livelihoods. The plaintiff is looking after the property as kartha of the family. During the life time of the wife of the plaintiff, she paid tax under assessment No.1457 for the period 2007-2008; and, after her death, the property is mutated in the name of the plaintiff; and, subsequently he is paying taxes. To the East of CF complex wall, there is a vacant site and to its further East, DE belongs to the plaintiff; and, to its further East, there is building of the defendants, which is shown as Eastern boundary in the registered sale deed, dated 14.03.1990. The defendants demolished the old building on the East of DE line vacant site. They started constructing a new building without the consent of the plaintiff and permission. In spite of warnings of the plaintiff, the defendants trespassed into the vacate site, CDEF of plaint plan and dug pits touching the wall-CF which belongs to the plaintiff and erected pillars and raised constructions by using their influence and with the help of their followers, who are antisocial elements having no respect for truth and law. The defendants want to construct a wall on the site covering the wall footings of the plaintiff's property to cause loss and destroy the property of the plaintiff. Hence, the suit for perpetual injunction was filed. Photographs and CD of the property are also filed. They clearly exhibit the illegal acts of the defendants in respect of B schedule of the plaint, ie., CDEF and CF wall in the plaint plan. Commissioner also mentioned in his report that the defendants encroached the vacant site of the plaintiff (about 8 inches) and inserted iron rods into CF wall; the defendants violated ad interim injunction orders and constructed their building and laid sun shade and slab iron rods covering the said 8 inches site.

Hence, it is necessary to declare the plaintiff as absolute owner of the site of 8 inches and grant the relief of recovery of possession after directing the removal of illegal constructions made by the defendants. Hence, the petition is filed.

6. The case of the defendants and the submissions made on their behalf, in brief, are as follows:

The material allegations in the affidavit filed in support of the petition are false. They are denied. K.L. Narayana purchased the suit property site with measurements East to West-15.7 feet on the Northern side and 11.3 feet on the Southern side; North to South – 111 feet and with the door No.4/58 from Darsi Chinna Seethaiah, under a registered sale deed, dated 10.03.1964. The plaintiff's wife purchased, from Kota Nagendra and Lakshmi Narayana, vacant site, which is situated between door nos.4/119 and 4/120, however, by showing wrong measurements on the Northern side as 15.9 feet from East to West instead of 15.7 feet from East to West. From the beginning the plaintiff wanted to knock away the site of the defendants one way or the other and with the help of rowdy elements. Plaintiff and Bontha Chinna Venkata Subbaiah constructed shopping complexes in their respective sites by leaving 4 feet site each to have passage. The plaintiff constructed complex with a width of 11.8 feet by encroaching one inch site of the defendants. As such, there is no site to the plaintiff on the Eastern side of CFG wall as shown in the plaint plan. The same was also shown by the advocate commissioner as BCEFG in his plan. According to the Commissioner's plan and report, plaintiff constructed his complex within the measurements of his vendor's document. As such, B schedule property is not in existence on ground from the date of construction of shopping complex by the plaintiff. Due to ill feelings, the suit is filed with false and untenable allegations. Not being satisfied with the filing of the suit, the plaintiff is harassing the defendants by one means or the other from time to time and causing mental

agony. The 2nd defendant is constructing shopping complex in his site after demolishing the old building. The amendment sought is barred by law of limitation.

7. At the hearing, learned counsel for the plaintiff submitted that by the time the petition for amendment of the plaint is filed, the trial has not yet commenced and that after Commissioner's report is filed, it came to light that the encroachment was already made. He would further submit as follows: - 'When the defendants started making constructions after demolition of the house in their property during the pendency of the suit, the further encroachment and trespass was made and, therefore, it has become necessary to seek amendment of the plaint to enable the plaintiff to claim the reliefs viz., declaration of title and recovery of possession after removal of constructions made by the defendants in the encroached portion. The amendment is based on a subsequent event. Therefore, the amendment is permissible. The trial Court erroneously dismissed the petition only on the ground that the proposed amendment is barred by time wrongly holding that the period of limitation is three years. In-fact the period of limitation is 12 years as per settled legal position. Even otherwise limitation being a mixed question of fact and law has to be decided after permitting the amendment, during the course of trial, by framing necessary issue. Law is well settled that merits of the proposed amendment cannot be gone into while dealing with an application seeking amendment.' Learned counsel placed reliance on the decision of this Court in **M.Kamalamma v. B.Doraswamy Reddy**¹, in support of his contentions.

8. Per contra, learned counsel for the defendants, while supporting the orders of the Court below, contended that the averments in the affidavit of the plaintiff and in the Commissioner's report make it evident that the alleged

¹ 2018 (1) ALD 634

trespass was made even by the date of the suit. However, the plaintiff deliberately filed a suit for perpetual injunction. Therefore, there are no *bona fides* in seeking the present amendment for converting the suit for declaration of title and recovery of possession. The attempt to convert the suit from perpetual injunction to one for declaration of title and other reliefs is being made to harass the defendants. The amendment is clearly barred by law of limitation. Since the issues are already framed and the amendment is being sought about seven years after the institution of the suit, the petition is barred under law.

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

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 in spite of due diligence, the parties could not have raised the matter before the commencement of the trial and that

² (2009) 2 SCC 409

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 *Revajetu 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.

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

³ (2009) 10 SCC 84

⁴ (2008) 5 SCC 117

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 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."

⁵ 2013 (1) ALD 1 (SC)

⁶ AIR 2004 SC 4102

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

⁷ (2002) 7 SCC 559

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 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.”

⁸ (2008) 8 SCC 511

⁹ (2006) 6 SCC 498

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 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. Be it noted that the amendment is being sought on the ground that during the pendency of the suit, the defendants encroached vacant site of about 8 inches and made constructions and violated ad interim orders. Therefore, the amendment being sought is also based on a subsequent event. It is pertinent to note that the amendment of the plaint in the instant suit is being sought to seek the relief of declaration of title and recovery of possession, apart from the relief of perpetual injunction, 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

¹⁰ (2005) 13 SCC 89

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, according to the plaintiff, on account of a subsequent event, namely, encroachment of vacant site of about 8 inches and inserting iron rods into CF wall during the pendency of the present 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, for effective adjudication of the *lis* and giving a quietus to the dispute between the parties, once and for all.

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 plaintiff for the amendment of the plaint and that the Court below is not justified in not permitting the plaintiff 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.695 of 2017 in O.S.No.32 of 2010 is allowed. The Court below shall now permit the plaintiff 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.

Miscellaneous petitions pending, if any, shall stand closed.

M.SEETHARAMA MURTI, J

09.07.2018
Vjl