

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.4684 OF 2017

ORDER:

This civil revision petition is filed under Article 227 of the constitution challenging the order in I.A.No.202 of 2017 in O.S.No.153 of 2012 dated 16.08.2017 passed by the IV Senior Civil Judge, City Civil Court, Hyderabad, whereby, the petition filed under Order VI Rule 17 C.P.C to amend the written statement was dismissed.

It is alleged by the second petitioner herein before the Trial Court that, his mother let out the suit schedule property to the respondent husband on execution of rental agreement dated 06.01.1981 i.e. Ex.A-7 and when the plaintiff in the suit was spreading rumour to be in possession of a 'WILL' of late Ashanna and stopped paying rent and also attempting to sell away the suit schedule property, without disclosing the 'WILL' to anyone. After issuing legal notice for eviction, the second petitioner herein and his mother filed eviction petition R.C.No.91 of 2008 on the file of Additional Rent controller at Secunderabad, against the plaintiff on the basis of Rental Agreement dated 06.01.1981 i.e. Ex.A-7. The plaintiff admitted the signature of her husband K. Narsing Rao on the rental agreement Ex.A-7 and the Rent Control Court ordered eviction of the defendant vide order dated 13.07.2011.

Though the petitioners orally briefed their counsel about the fact of employment and retirement of late Ashanna from South Central Railway, the fact may have slipped his attention to raise such plea in the written statement. The petitioners could not obtain any documentary evidence about the employment and retirement of late Ashanna from South Central Railway, at the time of briefing the counsel. Therefore, the counsel suggested the

factum of drawing pension from UCO Bank by the wife of late Ashanna-the alleged testator and also suggested that late Ashanna was employed in South Central Railway for which the respondent in R.C.No.91 of 2008 on 02.12.2010 simply stated that, he does not know whether late Ashanna was in the service of Railway Department. However, the petitioners filed an application earlier and it was allowed, but due to inadvertence, certain facts regarding employment of late Ashanna and his retirement from South Central railway were not brought on record before the commencement of trial. Therefore, the petitioners intended to amend the plaint, as claimed in the petition.

The respondent filed detailed counter, contending that, at this stage, after completion of trial, the petitioners cannot be permitted to amend the written statement introducing a new case and that, in the absence of any explanation that, despite exercise of due diligence, they cannot bring on record certain facts before commencement of the trial and the amendment cannot be allowed and sought to dismiss the petition.

Upon hearing argument of both the counsel, the Trial Court dismissed I.A.No.202 of 2017 on the ground that the petitioners failed to establish that despite exercise of due diligence, he could not bring certain facts before commencement of trial before the Trial Court.

Aggrieved by the order, the present civil revision petition is filed on the ground that the petitioners could establish that, despite exercise of due diligence, they could not bring those facts. Therefore, the petitioners filed I.No.202 of 2017 for amendment of written statement to incorporate certain facts by amending the

written statement and that the factum of employment of late Ashanna came to the notice for the first time only during pendency of the suit, but not at the stage of trial and sought to amend the written statement. But, the Trial Court did not consider the explanation offered by these petitioners and committed an error in dismissing the petition.

Learned counsel for the petitioners contended that, amendment can be allowed at any stage of the proceedings, as a matter of course, if it is pre-trial amendment and if it is post trial amendment, the petitioner has to explain the reason for failure to bring those facts on record before commencement of trial. But, here the petitioners allegedly came to know about retirement of late Ashanna from service in South Central Railway only subsequent to filing of written statement. Therefore, despite exercise of due diligence, the said fact was not brought on record before commencement of trial, as such there is no absolute bar from granting leave to amend the plaint, under proviso to Order VI Rule 17 C.P.C and placed reliance on the judgment of the Apex Court in **State of Andhra Pradesh v. Pioneers Builders**¹ in support of his contention.

Per contra, learned counsel for the respondent opposed the petition on the ground that, there is no absolutely reason as to why the petitioners could not bring those facts on record before commencement of trial and for the first time it was introduced during argument by the learned counsel for the petitioners and based on such contention, without any explanation in the affidavit, the petition cannot be amended and the order cannot be set-aside

¹ 2006 (12) SCC 119

by exercising power under Article 227 of the Constitution of India and requested to dismiss the petition.

Undisputedly, the petitioners are the nieces of the deceased Ashanna, whereas, the respondent is nephew of the deceased Ashanna. Therefore, both the parties are closely related to the deceased Ashanna and therefore, plea that they are not aware about the retirement of late Ashanna from South Central Railway is not acceptable in ordinary course. But, it is contended that, due to illiteracy, though they are aware about late Ashanna employment, they could not collect any evidence in support of it. Therefore, they did not raise any such plea before the Trial Court.

More so, in paragraph No.3 of the affidavit, it is stated that the petitioners orally briefed their counsel about the factum of employment of retirement of late Ashanna, the alleged Attestor of the 'WILL'. But, the said fact has skipped the attention to raise plea in the written statement. Thus, it is not his case that petitioner was totally unaware of the factum of employment and retirement of late Ashanna from South Central Railway. However, the petitioners after verification of the written statement found certain mistakes in the written statement and got amended by filing appropriate application under Order VI Rule 17 C.P.C. Even then, the petitioners did not realise the mistake committed in raising the plea regarding retirement of late Ashanna from South Central Railway being an employee.

The main endeavour of the learned counsel for the petitioners is that, only after securing documentary evidence in support of the employment and retirement from service of late Ashanna they filed this petition. For raising a plea before the

Court, no documentary proof is required to be obtained. Therefore, the ground urged in the petition seeking leave of the Court and to amend the plaint after commencement of trial is not satisfactory and on the other hand, very filing of earlier petition under Order VI Rule 17 C.P.C without raising such plea and filing of application for amendment of plaint under Order VI Rule 17 C.P.C directly establishing negligence on the part of these petitioners in bringing the factum of employment and retirement of late Ashanna from South Central Railway before commencement of the trial.

Order VI Rule 17 C.P.C deals with Amendment of Pleadings and according to it, the Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial.

But, in view of the rider to Order VI Rule 17 C.P.C by Act 22 of 2002 i.e. proviso, no amendment be permitted after commencement of trial. But, in **Mohinder Kumar Mehra v. Roop Rani Mehra and others**², the Apex Court reiterated the mandatory requirement to claim permission under Order VI Rule 17 C.P.C after commencement of trial.

Learned counsel drawn attention of this Court to certain paragraphs in the judgment referred supra, more particularly,

² (2018) 2 Supreme Court Cases 132

paragraph 9, where the Apex Court observed that, Although Order VI Rule 17 permits amendment in the pleadings “at any stage of the proceedings”, but a limitation has been engrafted by means of Proviso to the fact that no application for amendment shall be allowed after the trial is commenced. Reserving the Court’s jurisdiction to order for permitting the party to amend pleading on being satisfied that in spite of due diligence the parties could not have raised the matter before the commencement of trial. In a suit when trial commences? Order XVIII of the C.P.C. deal with “Hearing of the Suit and Examination of Witnesses”. Issues are framed under Order XIV. At the first hearing of the suit, the Court after reading the plaint and written statement and after examination under Rule 1 of Order XIV is to frame issues. Order XV deals with “Disposal of the Suit at the first hearing”, when it appears that the parties are not in issue of any question of law or a fact. After issues are framed and case is fixed for hearing and the party having right to begin is to produce his evidence, the trial of suit commences.

In **Vidyabai & ors v. Padmalatha**³, the Supreme Court held that, filing of an affidavit in lieu of examination-in-chief of the witnesses amounts to commencement of proceedings.

In **J. Samuel v. Gattu Mahesh**⁴, the Supreme Court laid down certain tests as to what is ‘due diligence’ with reference to Order VI Rule 17 C.P.C and proviso thereto and held as follows:

“3. diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An

³ 2009 (2) SCC 409

⁴ 2012 (2) SCC 300

advocate representing someone must engage in due diligence to determine that the representations made are factually accurate and sufficient. The term 'Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

14) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit”

In **Rameshkumar Agarwal v. Rajmala Exports Private Limited and others** (referred supra), the Apex Court, relying on **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others** (referred supra) to decide the scope of proviso to Order VI Rule 17 of C.P.C, held in paragraph nos.10 and 11 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 amendment:

- (1) whether the amendment sought is imperative for proper and effective adjudication of the cases;*
- (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. 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 illustrative and not exhaustive.”*

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 Gurawara (Dead) Thr. Lrs vs M/S. S.K.Sarwagi & Co. Pvt. Ltd**⁵, 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 this Court in **J. Samuel v. Gattu Mahesh** (referred supra), to exercise power under Order VI Rule 17 C.P.C to grant leave to amend the pleadings after commencement of trial, the petitioners have to establish that

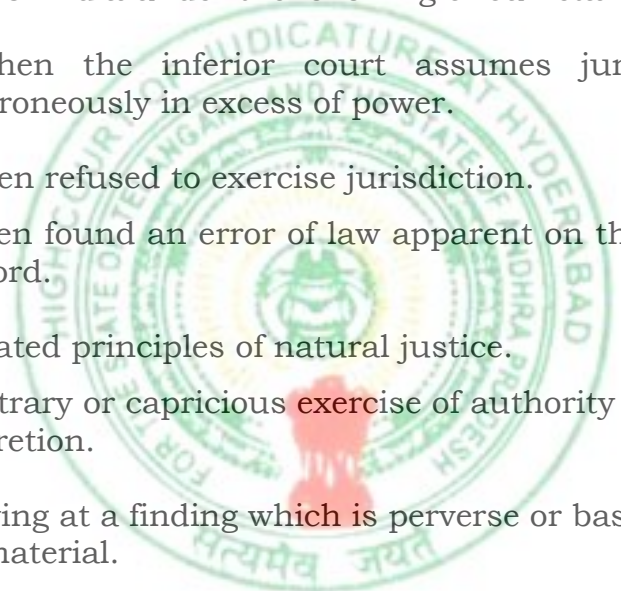
⁵ 2008 (14) SCC 364

despite exercise of due diligence, they could not bring those facts on record before commencement of trial. But, here, in this case, the petitioners were aware about the employment of late Ashanna before commencement of trial and on the other hand, in paragraph 3 of the affidavit, the petitioners themselves specifically stated that, they orally briefed their counsel to raise a plea about the amendment of late Ashanna. But, he could not raise such plea in the written statement before the Court below. Therefore, it compelled the petitioners to raise a specific plea after commencement of trial which cannot be permitted, unless it is established to the satisfaction of the Court that the petitioners despite exercise of due diligence, they could not bring those facts on record by amendment of plaint before commencement of trial.

Viewed from any angle, more particularly, taking into consideration of the allegations made in paragraphs 3 & 4, it is difficult to accept the contention of the learned counsel for the petitioners that the petitioners exercised due diligence, but could not bring those facts on record before commencement of trial before the Trial Court. On the other hand, filing of earlier application for amendment to rectify certain typographical or clerical mistakes also indicates that the petitioners are not diligent enough in prosecuting the proceedings, but filed the petition without establishing the requirements. Therefore, the Trial Court rightly dismissed the petition, which warrants no interference of this Court to exercise power under Article 227 of the Constitution of India, as the scope of Article 227 of the Constitution is limited.

This court can exercise revisional jurisdiction under Article 227 of the Constitution of India in limited circumstances and

nature of the jurisdiction is supervisory over the subordinate courts or the tribunals under the control of the High Court. The power of revision under Article 227 of the Constitution of India is limited to find out whether the order under challenge, passed by the subordinate court or tribunal within their jurisdictional limits and the main intention of exercising both administrative and judicial control under Article 227 of Constitution of India is to keep them within the bounds of their jurisdiction and not to allow them to transgress from their jurisdictional limits, but not otherwise. The Court can exercise jurisdiction under Article 227 of the Constitution of India under the following circumstances:

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- a) When the inferior court assumes jurisdiction erroneously in excess of power.
 - b) When refused to exercise jurisdiction.
 - c) When found an error of law apparent on the face of record.
 - d) Violated principles of natural justice.
 - e) Arbitrary or capricious exercise of authority or discretion.
 - f) Arriving at a finding which is perverse or based on no material.
 - g) A patent or flagrant error in procedure.
 - h) Order resulting in manifest injustice.
 - i) Error both on facts and law or even otherwise.”

Similarly, the Court cannot exercise its discretion under Article 227 of the Constitution of India in the following circumstances:

- a) Where the only question involved is one of interpretation of deed;
- b) On question of admission or rejection of particular piece of evidence, even though the question may be of everyday recurrence;

- c) To correct erroneous exercise of jurisdiction, as a Court of revision;
- d) To set aside an intra vires finding of the fact, except where it is founded on no material or is perverse;
- e) To correct an error of law, not being an error apparent on the face of the record;
- f) To interfere with the intravires exercise of discretionary power, unless it is violative of principles of natural justice;
- g) The Court shall not interfere on a merely technical ground which would not advance substantial justice."

Article 227 of Constitution of India deals with power of superintendence by the High Court over all Subordinate Court and Tribunals. The power of superintendence conferred upon the High Court by Article 227 is not confined to administrative superintendence only, but includes the power of judicial revision also even where no appeal or revision lies to the High Court under the ordinary law, rather power under this Article is wider than that of Article 226 in the sense that it is not subject to those technicalities of procedure or traditional fetters which are to be found in certiorari jurisdiction and such power can also be exercised *suo motu*. It is a well settled principle that the High Court can exercise supervisory power under Article 227 of Constitution of India, as held by the Apex Court in **State (N.C.T. Of Delhi) v. Navjot Sandhu@ Afsan Guru**⁶ that under Article 227 of Constitution of India the High Court can interfere with the directions of the Subordinate Courts.

In view of the law laid down by the Apex Court, this Court cannot exercise its power under Article 227 of the Constitution of India when the order impugned in the revision is passed within the

⁶ AIR 2005 SC 3820

jurisdictional limits, since the power can be exercised only to keep the subordinate Courts and Tribunals within its bounds.

Hence, I find no ground to interfere with the order passed by the Trial Court and consequently, the 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.

JUSTICE M. SATYANARAYANA MURTHY

Date:02.11.2018

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