

**HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

**CIVIL REVISION PETITION No.1921 OF 2018**

**ORDER:**

The Civil Revision Petition under Article 227 of the Constitution of India is filed questioning the order dated 26.02.2018 in I.A. No.29 of 2018 in O.S. No.36 of 2007 passed by the Principal Junior Civil Judge, Shadnagar,, dismissing the petition filed under Order VI Rule 17 read with Section 151 C.P.C.

2. The petitioner/plaintiff filed suit for declaration of title and delivery of possession and other consequential reliefs. After completion of trial, at the time of arguments, it is noticed that the petitioner did not seek the relief of declaration to declare that the Gift Deed dated 16.01.2002 and Sale deed dated 08.04.2002 are null and void and not binding on the petitioner/plaintiff. Therefore, sought leave to amend the plaint appropriately.

3. The respondent did not file counter, but opposed the petition.

4. The Court below on hearing both counsel, dismissed the petition.

5. Aggrieved by the impugned order, the revision petition is filed on the ground that Gift Deed was not executed by him, but by impersonation the same was created, hence, it is not binding on it and that the consequential sale is also not binding on the petitioner. In such a case, the petitioner has to obtain necessary relief of declaration that the gift deed and sale deed are null and void and not binding on the petitioner. But the Court below dismissed the petition without affording reasonable opportunity to the petitioner to give explanation that how the delay occurred and committed an error in dismissing the petition.

6. During hearing, learned counsel for the petitioner reiterated the

contentions urged in the petition mainly contending that the factum of execution of Gift Deed and Sale Deed came to the knowledge of the petitioner just before the filing the petition and therefore, the amendment petition is filed. Whereas, learned counsel for the respondent opposed the petition on the ground that the petitioner did not explain the reason for not filing the amendment petition before commencement of trial and the amendment cannot be allowed unless the petitioner establishes the due diligence and prayed to affirm the impugned order.

7. The petitioner/plaintiff filed suit for declaration of titled and other consequential reliefs in the year 2007 and it is being contested by the respondent. At the time of examination of PW.1, he came to know about execution of Gift Deed, Sale Deed referred supra and filed petition. Undisputedly in para 2 of the plaint, there is a reference about execution of Gift Deed, contending that the alleged Gift Deed is created and forged one and brought into existence with the help of interested persons. In the same para, the execution of sale deed was also referred. Therefore, the petitioner had knowledge about the execution of Gift Deed and Sale Deed on the date of filing suit i.e. in the year 2007 itself. Hence, the reason assigned by the petitioner that he came to know about the same at the time examination of PW.1 is ex facie false, on that ground the petition cannot be allowed.

8. In view of proviso by way of amendment to Order VI Rule 17 C.P.C. added by Act, 22 of 2002 unless the Court comes to conclusion that despite due diligence he could not have raised the matter before commencement of trial by the petitioner leave cannot be granted. When the trial is commenced, it is for the plaintiff to satisfy the Court that despite of exercise due diligence, failed to file application to bring certain facts on record on the Court. In the absence of any explanation, having knowledge

about the execution of documents, it is difficult to accept the contention that the petitioner despite exercise of due diligence could not bring those facts to the record before commencement of leave.

9. The law laid down by the Apex Court is clear that unless the petitioner is able to establish that despite exercise of due diligence he could not bring the fact on record before commencement of trial and such petition cannot be allowed. The Apex Court in **Baldev Singh v. Manohar Singh**<sup>1</sup> while deciding a similar issue with regard to commencement of trial, observed that, it is well settled by various decisions of this Court as well as the High Courts in India that Courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference was made to a decision of the Privy Council in **Ma Shwe Mya v. Maung Mo Hnaung**<sup>2</sup> in which the Privy Council observed as follows:

*"All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit."*

10. In **Baldev Singh**<sup>5</sup> case, the Apex Court in the concluding paragraphs held as follows:

*"Before we part with this order, we may also notice that proviso to Order 6 Rule 17 of the 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*

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<sup>1</sup> LAWS (SC)-2006-8-5

<sup>2</sup> (AIR 1922 P.C. 249)

*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 herein after, 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 of the 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.”*

11. It appears from the principle laid down in **Baldev Singh**<sup>5</sup> case that the issues were framed in the Trial Court after completion of pleadings by both the parties in the suit and after amendment of C.P.C by Act 22 of 2002, posting the suit for filing documents or list of witnesses is deleted and according to Order VII Rule 14 (1) & (2) C.P.C and Order VIII Rule 1A (1) & (2) C.P.C, the parties to the suit have to file the list of documents which they are relying upon and sued on, along with their pleadings and if any document is not available, they have to state in whose possession the document is available. Therefore, posting the suit for filing of documents, after framing issues is totally taken away by Act 22 of 2002. In any view of the matter, it is clear from the law declared by the Apex Court that commencement of Trial as used in the proviso to Order VI Rule 17 C.P.C is only in the limited sense as meaning the final hearing of the suit, examination of witness, and advancing arguments. Therefore, framing of issues is not the starting point of commencement of trial. In the suit before the Trial Court, which is the subject matter of the present petition, issues were admittedly framed by the Trial Court, the evidence of the respondents/ plaintiffs has not yet commenced. In such case, it is difficult

to hold that the trial has been commenced in view of the law declared by the Apex Court in the judgment referred supra.

12. 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**<sup>3</sup>, 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.

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,

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<sup>3</sup> 2009(8) SCJ 401

"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."

13. In view of the guidelines laid down by the Apex Court in **Revajeetu Builders and Developers** case, the Court has to examine whether the proposed amendment would fall within the parameters laid down by the Apex Court and if the proposed amendment is not permissible within the parameters laid down, the Court is bound to reject the amendment.

14. In **Rajkumar Guruwara (dead) through LRs v. S.K. Sarwagi and Company Private Limited and another**<sup>4</sup> the Apex Court had an occasion to deal with the proviso to Order VI Rule 17 C.P.C for amendment of plaint after commencement of trial and its permissibility. In paragraph 13 of the judgment, the Apex Court held that, to put it clear, Order VI Rule 17 C.P.C. confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial. As rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he will have an opportunity of meeting the amendment sought to be made. In the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the part of the Court to satisfy the conditions prescribed in the proviso. But, in the said judgment, no guidelines were laid down by the Supreme Court as to the date of commencement of trial, but concluded

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<sup>4</sup> (2008) 14 Supreme Court Cases 364

that only after completion of evidence, prejudice to the opposite party may arise and in such an event, the proviso to Order VI Rule 17 C.P.C is required to be considered by the Courts while exercising power under Order VI Rule 17 C.P.C.

15. What is due diligence is a question to be decided by the Court, in the Judgment of the Apex Court in **J.Samuel and others v Gattu Mahesh and others**<sup>5</sup> reiterated that due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Due diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An 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. 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. The term typographical error is defined as a mistake made in the printed/typed material during a printing/typing process. The term includes errors due to mechanical failure or slips of the hand or finger, but usually excludes errors of ignorance. Therefore the act of neglecting to perform an action which one has an obligation to do cannot be called as a typographical error. The Apex Court while considering application under Order VI Rule 17 C.P.C. discussed with the proviso to Order VI Rule 17 C.P.C. as introduced in Act 22 of 2002 and held that failure to exercise reasonable care as ordinary prudent man amounts to negligence.

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<sup>5</sup> (2012)2 SCC 300

16. In another judgment of the Apex Court reiterated in **Chander Kanta Bansal vs Rajinder Singh Anand**<sup>6</sup> considered the scope of Order VI Rule 17 for amendment of pleading and held that a care should be taken to see that injustice and prejudice to the opposite party. In the later judgment of the Apex Court in **Vidyabai and others v Padmalatha and another**<sup>7</sup> discussed the scope of proviso to Order VI Rule 17 C.P.C. for amendment of pleading. The bar created by the proviso will come in the way after commencement of trial and such amendment cannot be allowed as a matter of routine. Therefore, unless, the petitioner proved that despite due diligence, he could not bring the facts to the notice of the Court by way of amendment, such amendment after commencement of trial cannot be allowed.

17. Even according to **Revajeetu Builders and Developers** case, pre-trial amendments can be allowed and post trial amendments cannot be allowed. In the present facts of the case, Gift Deed and Sale Deed are executed in the year 2007 as they were referred specifically in para 2 of the plaint, but contended that they were executed by impersonation. When the execution of documents is within the knowledge, the limitation starts from the date of execution as per Article 56 of the Limitation Act. Therefore, execution of documents came to the knowledge of the petitioner in the year 2007 when the suit is filed making reference about the execution of the documents by impersonation, but the amendment petition is filed in the year 2017. As such by the date of filing petition, the claim of the petitioner is hopelessly barred by limitation and such amendment cannot be allowed. Hence, I find no grounds to reverse the impugned order passed by the Court below.

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<sup>6</sup> (2008)5 SCC 117

<sup>7</sup> (2009) 2 SCC 409

18. In the result, the civil revision petition is dismissed affirming the order dated 26.02.2018 in I.A. No.29 of 2018 in O.S. No.36 of 2007 passed by the Principal Junior Civil Judge, Shadnagar. There shall be no order as to costs.

Consequently, Miscellaneous Petitions, if any, pending in the present Civil Revision Petition stand closed.

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**M. SATYANARAYANA MURTHY, J**

**October 30, 2018**  
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