

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL REVISION PETITION No.2298 of 2018

ORDER:

Heard learned counsel for the petitioners and proof of service of respondent Nos.2 to 8 filed and there is no representation despite service including to the advocate on record before the lower Court, taken as heard and perused the impugned order of the lower Court and the grounds of revision.

The lower Court by the impugned order dated 12.02.2018 in I.A.No.2645/2017 in the pending suit O.S.No.239/2005 (Principal Junior Civil Judge, Ongole) dismissed the application for amendment of the plaint from the relief of permanent injunction into one for declaration of title as owner of the property with consequential relief of delivery of possession and from defendant Nos.2 to 8 supra with averments that after filing of the suit, leave about the earlier round of litigation covered by O.S.Nos.32 of 1970 & 116 of 1996, the defendants highhandedly trespassed into the schedule property and encroached 15 days ago from the amendment petition filed on 18.12.2017 which made to alter the same from the relief of permanent injunction to the relief of declaration with possession also.

The respondents/defendant Nos.2 to 8 opposed the petition by denying the averments leave apart the other contentions not germane for the purpose of petition, suit claim is not maintainable and barred by resjudicata, of the allegation of trespass or dispossession is false and set up for the reason that the late 1st defendant took possession through Court way back in 2005 and even by the date of filing of the suit, the plaintiff was not in

possession. What the trial Court observed therefrom is that in the litigation covered by O.S.No.221 of 1982 culminated in decree and judgment of A.S.No.2132 of 1993 on the file of this Court by doctrine of merger ended in dismissal in 2005 and E.P.No.73 of 2005 filed and through Court delivery taken that was pleaded in written statement of sole defendant and there is no amendment sought immediately thereafter and no steps taken immediately after the said written statement plea by filing application and the present application filed after lapse of several years thereafter cannot be permitted for the latches to seek amendment by adopting back door method, more particularly, from the bar under Order 6 Rule 17 amended CPC to the bar of amendment after trial commenced without due diligence.

It is impugning the same, the present revision is filed with the contentions that the impugned order is unsustainable and from the very petition averments dispossessed few days before filing of the petition and what was contested in the written statement is not the basis for the amendment but what is averred in the affidavit and once it will not change the cause of action and nature of suit the amendment can be liberally considered and the rider under Order 6 Rule 17 CPC has no strict application to subserve the ends of justice, the revision is to be allowed.

Learned counsel for the petitioners placed reliance on the expression of this Court in **Mareddy Seetharathnam Vs. Siruvuri Venkatarama Raju**¹ where particularly at Para 6(a)(x) referring to the expression of the Apex Court in **Sampath Kumar Vs.**

¹ 2016 SCC Online Hyd 352

Ayyakannu² that in a suit for injunction to be converted for declaration and recovery of possession, the basic structure of the suit is not altered for the proposed amendment instead of filing independent suit, the relief can be granted to avoid multiplicity of proceedings and held by the Apex Court the amendment could have been permitted.

Here due diligence on the part of the petitioners/plaintiffs for amendment to be considered no doubt from the amended provision of Order 6 Rule 17 CPC the due diligence to be considered is from what is pleaded in the petition affidavit rather than what was pleaded in the written statement way back. What was pleaded in the written statement after 2005 pursuant to the litigation covered in earlier O.S.No.221 of 1982 possession allegedly taken by filing E.P.No.73 of 2005 and not even mentioned when possession taken and when delivery recorded if any and what petitioners specifically pleaded in the affidavit petition of dispossessed only 15 days prior to the filing of the petition even same is considered it is within the scope of the due diligence contemplated by the amended Order 6 Rule 17 CPC, leave about the proposed amendment no way changes cause of action nor in nature of the suit as held by the Apex Court supra.

Having regard to the above, this Civil Revision Petition is allowed subject to costs of Rs.2,000/- payable to the Army Welfare Fund on or before 04.06.2018 and filing of proof before the trial Court by that day and subject to that filing of proof, the lower Court should permit to carry the amendment with consequential amendment subject to payment of deficit Court fee.

² (2002) 7 SCC 559

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 27.04.2018
ska

