

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.3848 OF 2017

ORDER:

This revision is filed under Article 227 of the Constitution of India questioning the propriety and legality of the order dated 28.03.2017 passed in I.A.No.601 of 2016 in A.S.No.54 of 2015 on the file of the VI Additional District Judge, Sompeta, allowing an application filed under Order VI Rule 17 of the Code of Civil Procedure (CPC) read with Rule 28 of the A.P. Civil Rules of Practice, granting leave to the respondent to amend the plaint to seek relief of recovery of possession on the ground that the petitioner allegedly trespassed into the property subsequent to filing of appeal pending before the District Judge.

The respondent filed the petition under Order VI Rule 17 CPC alleging that the petitioner filed suit for declaration of title and consequential relief of injunction and the suit was dismissed on various grounds. However, during pendency of the appeal, the petitioner allegedly trespassed into the suit schedule property during February 2016 with the help of his followers to cause wrongful loss to the respondent herein and wrongful gain to him. Thus, in view of the illegal trespass into the schedule property, the petitioner requested leave of the Court to amend the plaint suitably to enable them to claim relief of recovery of possession.

The petitioner herein-respondent filed counter denying the material allegations, *inter alia*, contending that the allegation that this petitioner trespassed into the property during the pendency of the appeal during the month of February 2016 by illegal means is not true and in fact, the petitioner himself is continuing in

possession and enjoyment of the property and the trial Court also recorded specific finding as to the possession as on the date of filing the suit holding that the petitioner is in possession and enjoyment of the property and dismissed the suit and in such case, the suit for declaration and consequential relief of permanent injunction cannot be converted into suit for declaration and recovery of possession and prayed for dismissal of the petition.

Upon hearing both the counsel, the trial Court extracted the contentions of both the parties including the testimonies of the witnesses P.Ws.1 to 3 and finally allowed the petition on the ground that no prejudice would be caused if the amendment is allowed and such questions could be decided only after hearing the appeal.

Aggrieved by the order, the present revision is filed under Article 227 of the Constitution of India on the ground that the trial Court recorded a finding that the respondent is out of possession as on the date of the judgment and the alleged trespass in the second week of February, 2016 is false but the trial Court, without recording any specific finding as to exercise of due diligence, allowed the application and the order of the appellate Court is illegal and contrary to the proviso to Order VI Rule 17 CPC and prayed to set aside the impugned order exercising the power under Article 227 of the Constitution of India.

During hearing, Sri Kowturu Pavan Kumar, learned counsel for the petitioner, would contend that the trial Court recorded a specific finding that the respondent is out of possession according permission to the petitioner and respondent to amend the plaint suitably enabling them to claim relief of recovery of possession on

the alleged cause of action that has arisen in the second week of February, 2016 during the pendency of the appeal is serious illegality committed by the Court below and prayed to set aside the order impugned.

Learned counsel for the respondent supported the order under challenge in all respects.

Undoubtedly, the respondent filed the suit only for relief of declaration of title and for consequential permanent injunction restraining the petitioner and their men from interfering with the peaceful possession and enjoyment of the suit schedule property and after full-fledged trial, the trial Court recorded a specific finding in paragraph Nos.27 and 28 of the order impugned holding that the plaintiff-respondent was not entitled to claim declaratory relief in view of the bar to proviso to Section 34 of the Specific Relief Act as he was out of possession and though he was entitled to claim the consequential relief of recovery of possession by the date of filing the suit.

Aggrieved by the judgment and decree, the plaintiff preferred an appeal and invented a story of trespass into the property during the second week of February, 2016 and dispossessed the plaintiff-second respondent from the suit schedule property. This contention is contrary to the finding already recorded by the trial Court in the judgment which is the subject matter of the appeal. No piece of material is produced before the Court in support of the contention, however, the trial Court accepted the contentions while extracting few sentences in the evidence of P.Ws.1, 2 and 3 regarding admission that the respondent was out of possession as on the date of filing the suit. Despite clear and categorical

evidence on record that the plaintiff was out of possession as on the date of examination of plaintiff as P.W.1, he did not take steps to amend the plaint suitably to seek relief of recovery of possession.

As per proviso to Order VI Rule 17 CPC which is enacted Act 21 of 2002, there is a clear bar on the power of the Court to grant permission to amend the pleadings subsequent to commencement of the trial but it is subject to satisfying the Court that despite that exercise of due diligence, the respondent herein could not bring certain facts to the notice of the Court by way of pleadings. In the present case, though plaintiff No.1 was examined as P.W.1 before the trial Court and specifically justified that the plaintiffs were out of possession still the same party invented a story of trespass into the property during the pendency of the appeal and that apart, the property was sold long back which is in the year 2003 under different sale deeds and it was the subject matter of earlier suit in O.S.No.69 of 1983 and A.S.No.63 of 1993 before the Senior Civil Judge Court, Sompeta. Thus, the petitioner is aware of that the title and possession not with the petitioner since the date of main transaction. Despite it, the petitioner did not take steps to amend the plaint suitably for one reason or the other.

However, the Court cannot exercise power under Order VI Rule 17 CPC to accord permission to the parties to amend their pleadings as a matter of routine and unless the party who seeks permission to amend the pleadings satisfies the Court that despite exercise of due diligence, the petitioner could not bring certain facts to the notice of the Court by way of amendment, the Court cannot pass such an order in favour of the plaintiff in the present

suit. The general principle of amendment of pleadings is that the Court may, at any stage of the proceedings, allow either party to alter or amend the pleadings in such manner that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties but no application for amendment shall be allowed after the trial has commenced. However, the principles of Order VI Rule 17 CPC are well settled. They are; the amendment shall not alter the basic structure or nature of the claim and that the amendment shall not take away the valuable right that accrued to the respondent or such amendment will not take away the unequivocal admissions made in the pleadings. However, by proviso to Rule 17 of Order VI CPC, an interdict is created, according to it, 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.

It is pertinent to note that the respondents filed the present application only for disposal of the suit by the trial Court, having maintained silence though he is aware of the physical possession of the property, trial and disposal of the suit as a different cause of action has arisen in the second week of February, 2016. A finding was recorded by the trial Court that the plaintiffs/respondents were out of possession on the face of the record and in fact, there is no whisper in the order passed by the Court below. The intention of the Legislature in incorporating Order VI Rule 17 CPC is to avoid multiplicity of litigations, permitting the parties to amend their pleadings appropriately. The Apex Court in

A.Krishna Rao v. A.Narahari Rao and others¹, while dealing with an application under Order VI Rule 17 CPC, held that, rejection of petition under Order VI Rule 17 CPC on the ground that proposed amendment is inconsistent with original plea and petitioner cannot be permitted to raise such inconsistent plea is not justified. Amendment of pleading cannot be rejected even if proposed amendment has effect of raising conflict in plea. It is for the plaintiff to justify his pleadings and prove the same with reference to evidence. Since the procedure being handmaid of justice, a party cannot be deprived of his right to raise pleadings by way of amendment unless proposed amendment results in failure of justice.

The Apex Court in **Baldev Singh v. Manohar Singh**², 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. The Apex Court held as under.

“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 is 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

¹ 2015(1) ALT 113

² LAWS (SC)-2006-8-5

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 reasons to reject the application for amendment of the written statement in view of proviso to Order VI 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.”

In this connection, reference was made to a decision of the Privy Council in **Ma Shwe Mya v. Maung Mo Hnaung**³ in which the Privy Council observed as under.

“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.”

In the later judgment of the Apex Court in **Revajeetu Builders and Developers V. Narayanaswamy & Sons and others**⁴ laid down certain guidelines for granting or denying relief under Order VI Rule 17 CPC which are as under.

“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 (AIR 1922 P.C. 249)

⁴ 2009(8) SCJ 401

- (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

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.

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 Guruwara (dead) through LRs v. S.K. Sarwagi and Company Private Limited and another**⁵, the

⁵ (2008)14 SCC 364

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 intents to prejudice the other party; and
- (iii) when allowing amendment application defeats the law of limitation.

In view of the guidelines laid down by the Apex Court in various judgments, the proposed amendment after disposal of the suit by the trial Court holding that the plaintiffs were out of possession cannot be permitted since the alleged trespass during the pendency of the appeal is neither true nor correct but allowing the petition under Order VI Rule 17 CPC on the ground that no prejudice would be caused to the petitioner herein alone is not a ground to allow such applications and in such case, the Court cannot exercise power under Order VI Rule 17 CPC to amend the pleadings, such as plea of recovery of possession.

Even otherwise, time barred amendments cannot be allowed. The trial Court also recorded a specific finding in para-28 that the suit claim of the petitioner was also barred by limitation. This court cannot decide the merits of the proposed amendment but the Court has to decide such amendment can be allowed subject to the limitations stated above. In view of the judgments referred to supra, the respondent failed to establish that despite exercise of due diligence they could not amend the plaint suitably. That apart, in view of the guidelines in **Revajeetu Builders⁴** and

Rajkumar Guruwara⁵, allowing the proposed amendment by the Court below is illegal and in the absence of recording specific finding as to exercise of due diligence by the respondents, the order cannot be sustained since the appellate Court exercised its discretion which is not conferred on it. Therefore, the order under challenge is hereby set aside while exercising power under Article 227 of the Constitution of India.

In the result, the Civil Revision Petition is allowed and the order dated 28.03.2017 passed in I.A.No.601 of 2016 in A.S.No.54 of 2015 on the file of the VI Additional District Judge, Sompeta, is set aside. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(M.SATYANARAYANA MURTHY, J)

23rd January 2018
RRB

