

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

C.R.P.No.5134 of 2017

ORDER

This revision under Article 227 of the Constitution of India is filed challenging the order dated 30.06.2017 passed in I.A.No.929 of 2015 in O.S.No.93 of 2009 by the Principal Junior Civil Judge, Bapatla, Guntur District.

2. The petitioner/plaintiff filed application under Order 6 Rule 17 and Section 151 of CPC seeking leave of the Court to amend the plaint, alleging that she filed the suit for mandatory injunction to remove the encroachments raised by the first respondent/first defendant in ABCD passage and also for permanent injunction restraining the respondents/defendants and their men from interfering with the said passage by making any encroachments or otherwise. The defendants opposed the suit by filing a written statement. The suit was posted for arguments.

3. As per the contention of petitioner, ABCD joint passage of plaint plan is covered by 4 yards width and it was intended for ingress and egress of people of both sides and therefore, she sought for leave to amend the plaint to declare that the said passage of plaint plan is 4 yards width and 171 feet length and also seeks leave of the Court to carry out the consequential amendments.

4. The respondents/defendants disputed the same by filing counter. They denied the width of passage as 4 yards and the

alleged encroachments. They contended that in paragraph No.6 of the written statement, they specifically pleaded that ABCD passage is not in existence and it was never enjoyed by plaintiff or her predecessors-in-title. Therefore, the respondents denied the very existence of passage in the written statement, which was filed long before filing of this petition. They specifically contended that the suit was posted for arguments and at this stage, the present petition cannot be allowed and prayed for dismissal of the petition.

5. Aggrieved by the said order, the present revision is filed by petitioner on various grounds and mainly on the ground that the proposed amendment would not change the nature of the suit and no further evidence need be adduced and that the proposed amendment is just and necessary to decide the controversy in the suit and the trial Court has erroneously dismissed the petition on wrong appreciation of facts and law and committed an error.

6. During hearing, learned counsel for petitioner Sri P. Mehar Srinivasa Rao, has reiterated the grounds urged in the petition. He has drawn the attention of this Court about the necessity to amend the plaint at the stage of arguments and that too, to avoid multiplicity of litigation, she sought to amend the plaint seeking additional relief of declaration that the width of ABCD passage is 4 yards and length is 171 feet.

7. Learned counsel for respondents opposed the petition.

8. Undisputedly, the suit was filed for mandatory injunction for removal of encroachments in ABCD alleged joint passage and for grant of perpetual injunction restraining the defendants and their men from interfering with the possession and enjoyment of ABCD passage in any manner. The suit was filed in the year 2009 and the amendment petition was filed in the year 2015 i.e., after six years. There is no dispute about completion of trial and completion of arguments by plaintiff and the suit was posted for defendants' arguments. The defendants have denied the very existence of ABCD passage in the plaint plan in their written statement, which was filed long prior to the commencement of trial. Therefore, the respondents have disputed the very existence of joint passage from the date of filing of written statement. But the petition was filed after 6 years from the date of filing the suit. No data is produced before this Court as to the date of filing the written statement before the trial Court and framing of the issue. Even though a copy of written statement is placed on record, no date is mentioned in it. Therefore, it is difficult to decide the exact date of filing of written statement to hold that the proposed amendment is barred by limitation.

9. Yet, another contention raised by petitioner is that the proposed amendment can be granted at any stage as no further evidence is required to be adduced by both the parties and based on the evidence available, the Court can decide the dispute between the parties. Though the evidence is adduced, if leave is granted permitting the petitioner to carry out the amendment, an opportunity should be given to defendants to file subsequent pleadings under

Order 8 Rule 9 of CPC and an issue is required to be framed and further opportunity should also be given to the parties to adduce evidence on the additional issue framed. Therefore, on the ground that no further evidence is required to be adduced, such proposed amendment cannot be allowed. On the other, according to proviso to Order 6 Rule 17 CPC and by Act 2 of 2002, no application for amendment shall be allowed after the trial has commenced, unless, the Court comes to a conclusion that in spite of due diligence, the party could not have raised the matter before commencement of trial. In view of the said proviso, the petition is not maintainable as the trial is completed and the suit was posted for arguments. In fact, the entire affidavit is silent as to the due diligence exercised by petitioner, which is a mandatory requirement to entertain such application in view of the proviso to Order 6 Rule 17 of CPC. In view of the interdict in 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**¹, the Apex Court has highlighted the mandatory requirement to claim permission under Order VI Rule 17 C.P.C after commencement of trial.

10. In the earlier judgment in **J. Samuel v. Gattu Mahesh**², the Supreme Court has laid down certain tests as to what is 'due diligence' with reference to Order VI Rule 17 C.P.C and proviso therefor and held as follows:

¹ (2018) 2 Supreme Court Cases 132

² 2012 (2) SCC 300

“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 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”

11. In view of the law declared by the Apex Court in the judgments referred supra, the amendment cannot be allowed since the petitioner did not exercise due diligence and failed to bring those facts on record before commencement of trial. By applying the principle laid down in **J. Samuel’s** case, referred supra., the order of the trial Court cannot be interfered with. Therefore, I find no error in the order passed by the Court below calling for interference by this Court and consequently, the revision is liable to be dismissed.

12. In the result, the Civil Revision Petition is dismissed. No order as to costs. Miscellaneous petitions, if any, pending in this revision shall stand dismissed.

M. SATYANARAYANA MURTHY, J

5th November, 2018

sj