

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.2682 of 2018

ORDER:

This civil revision petition is filed under Article 227 of Constitution of India challenging the order dated 24.01.2018 passed in I.A.No.560 of 2017 in O.S.No.138 of 2011 by the Additional Senior Civil Judge, Kurnool, whereby petition filed under Order VI Rule 17 and Section 151 of Civil Procedure Code (for short "C.P.C."), was dismissed.

The petitioner filed petition under Order VI Rule 17 of C.P.C. seeking leave of the Court to amend the written statement alleging that he filed a detailed written statement in the main suit and it is coming up for adducing his evidence. While preparing his chief examination affidavit, his present counsel observed that there are certain mistakes in the written statement filed on his behalf and those mistakes have to be rectified by carrying out the amendments, as detailed in the petition schedule. The mistakes crept in the written statement, were not willful and they are to be rectified and requested to grant leave to the petitioner to amend the written statement.

Respondent No.1 reported no counter. Respondent No.2 filed counter denying material allegations interalia contending that after commencement of trial, permitting amendment of the pleadings of the parties to the suit is not routine. The petitioner has to establish that despite due diligence, he could not raise such plea before commencement of trial and there is no pleading as to exercise of

due diligence in the entire affidavit. The proposed amendment is inconsistent with the pleadings raised in the written statement and such amendment cannot be allowed and prayed to dismiss the petition.

Upon hearing argument of both the counsel, the trial Court dismissed the petition on the ground that the proposed amendment is inconsistent with the plea raised in the original written statement and such amendment cannot be allowed after commencement of trial and that it causes prejudice to the respondents.

Aggrieved by the said order, the present revision is filed under Article 227 of the Constitution of India on the ground that the petitioner is not introducing any new case in the written statement but introducing some new documents, but introduction of documents would not cause any prejudice to the respondents and the proposed amendment is just and necessary to adjudicate the real controversy between the parties, but the trial Court did not consider the various contentions raised by the petitioner, which prompted him to file additional written statement, and committed error in dismissing the petition and requested to set aside the order passed by the trial Court and allow the revision.

During hearing, learned counsel for the petitioner while reiterating the contentions urged in the revision, contended that when the proposed amendment would not cause any prejudice and would not bring any new facts except introducing certain documents. The bar under Order VI Rule 17 of C.P.C. will not come in the way of allowing such amendment and placed reliance on the

judgment of Apex Court rendered in “**Baldev Singh v. Manohar Singh**¹”. On the strength of the principles laid down in the said judgment and observations made in paragraph No.8 of the judgment with the approval of “**Ma Shwe Mya v. Maung Mo Hnaung**²” the learned counsel for the petitioner contended that power under Order VI Rule 17 of C.P.C. has to be exercised liberally, 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 and the Apex Court also made several observations with reference to proviso to Order VI Rule 17 of C.P.C. Learned counsel for the petitioner requested to allow the revision.

Learned counsel for the respondents opposed the petition while supporting the impugned order on the ground that in view of proviso to Order VI Rule 17 of C.P.C. the petition cannot be allowed when the evidence of the plaintiff was closed and the suit is coming up for the evidence of defendants and prayed to dismiss the revision.

The suit was filed for partition of the suit schedule property and the defendant filed written statement initially and the evidence of the plaintiff was closed, at this stage an affidavit under Order XVIII Rule 4 of C.P.C. is being prepared by the counsel for the petitioner, he advised the petitioner to file a petition to rectify the mistakes in the written statement, unless those mistakes are corrected, they will affect the defence set up by the petitioner.

¹ (2006) 6 SCC 498

² AIR 1922 PC 249

Therefore, the advice of the counsel prompted the petitioner to file petition under Order VI Rule 17 of C.P.C.

In paragraph No.3 of the affidavit filed along with the petition, it is stated as follows:

“While preparing my chief examination affidavit, my preseth counsel had observed that there are certain mistakes in the written statement filed on my behalf in the above suit, and that those mistakes are to be rectified by carrying out certain amendments, as detailed in this petition schedule. Those mistakes, that have cropped up in my written statement, were neither willful nor due to negligence, and they are to be rectified.....”

Therefore, the reason for filing petition is the advice of the counsel. But the affidavit is silent as to why he could not bring those facts before commencement of trial despite exercise of due diligence, it is the basic requirement after amendment of C.P.C. by Act 22 of 2002. This amendment was only to prevent delay in disposal of the suit pending before the Courts and to render speedy justice to the parties, who approached the Court. Though it is mandatory, the petitioner did not explain as to why he could not bring those facts on record before commencement of trial despite exercise of due diligence. The respondent in the counter raised a specific plea that the amendment cannot be allowed at the stage when the evidence is closed.

Learned counsel for the petitioner contended that the bar under proviso to Order VI Rule 17 of C.P.C. will not come in the way when no prejudice is caused and placed reliance on “**Baldev Singh v. Manohar Singh**” (referred supra). In the said judgment, the Apex Court held that “commencement of trial as used in

proviso to Order VI 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.” Based on this observation, the learned counsel requested to allow the petition.

This principle was considered by the Full Bench of the Apex Court in “**Kailash v. Nanhku**”³ and held as follows.

“At this point the question arises : When does the trial of an election petition commence or what is the meaning to be assigned to the word 'trial' in the context of an election petition? In a civil suit, the trial begins when issues are framed and the case is set down for recording of evidence. All the proceedings before that stage are treated as proceedings preliminary to trial or for making the case ready for trial. As held by this Court in several decided cases, this general rule is not applicable to the trial of election petitions as in the case of election petitions, all the proceedings commencing with the presentation of the election petition and upto the date of decision therein are included within the meaning of the word 'trial’”

In “**Vidyabai v. Padmalatha**”⁴ the Apex Court held that the trial is deemed to commence when the issues are settled and the case is set down for recording of evidence.

In view of the law laid down in “**Vidyabai v. Padmalatha**” (referred supra) it is difficult for me to accept the principle laid down “**Baldev Singh v. Manohar Singh**” (referred supra) with regard to the word “commencement of trial” used in proviso to Order VI Rule 17 of C.P.C.

In any view of the matter, in the facts of the “**Baldev Singh v. Manohar Singh**” (referred supra) the trial was not yet commenced. Therefore, the Apex Court allowed the petition filed

³ (2005) 4 SCC 480

⁴ AIR 2009 SC 1433

under Order VI Rule 17 of C.P.C. as the proposed amendment is pre-trial amendment. In the present case, the petitioner was advised to file petition only when the petitioner preparing the affidavit under Order XVIII Rule 4 of C.P.C., in such case, the trial is deemed to have commenced in view of the law laid down by the Apex Court in “**Vidyabai v. Padmalatha**” (referred supra), and the affidavit is totally silent as to the exercise of due diligence by the petitioner before commencement of trial.

In the later judgment in “**J. Samuel v. Gattu Mahesh**”⁵, 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 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”

Similarly, in “**Rajkumar Gurawara (Dead) Thr. Lrs vs M/S. S.K.Sarwagi & Co. Pvt. Ltd**”⁶, the Apex Court laid down the

⁵ 2012 (2) SCC 300

⁶ 2008 (14) SCC 364

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 petitioner has to establish that despite exercise of due diligence, he could not bring those facts on record before commencement of trial.

If this principle is applied to the present facts of the case, there is absolutely nothing to conclude that the petitioner could not bring those facts despite exercise of due diligence before commencement of trial. In the absence of satisfactory explanation by the petitioner that despite exercise of due diligence he could not have brought on record certain facts before commencement of trial. In view of interdict contained under Order VI Rule 17 of C.P.C. such amendment cannot be allowed.

The trial Court dismissed the petition on the ground that the proposed amendment is wholly inconsistent with the earlier plea raised in the written statement. But the principles for amendment of written statement cannot be equated with the principles applicable for amendment of plaint since the defendant is entitled to take inconsistent pleas. But dismissal of the petition on the

ground that the proposed amendment is inconsistent with the plea raised in the written statement is an illegality. Therefore, I find that the reason assigned by the trial Court for dismissal of the petition is illegal. However, in view of failure of the petitioner to give satisfactory explanation that despite exercise of due diligence, he could not bring certain facts on record before commencement of trial, the revision is liable to be dismissed.

In the result, the civil revision petition is dismissed. No costs.

The miscellaneous petitions pending, if any, shall also stand closed.

16.11.2018
Ksp

JUSTICE M. SATYANARAYANA MURTHY

