

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION No.3454 OF 2017

ORDER:

This Civil Revision Petition, under Article 227 of the Constitution of India, is filed by the petitioner - petitioner - plaintiff, challenging the order, dated 04.07.2017, in I.A. No.522 of 2017 in O.S. No.168 of 2009, passed by the learned Principal Junior Civil Judge, Peddapuram, whereby the petition filed under Order VI, Rule 17 of the Code of Civil Procedure, 1908 (for short 'Code') was dismissed, on the ground that when the suit was coming for continuation of argument of the plaintiff, who is petitioner herein, the petitioner filed the said petition, and amendment petition cannot be allowed after commencement of trial in the absence of any explanation that he could not bring those facts on record before commencement of trial, despite exercising due diligence.

2. The petitioner filed the suit for injunction against the respondent restraining him from interfering with his possession over the plaint schedule property. The plaintiff set up a Will, dated 10.06.1991 executed by his father in his favour bequeathing the property creating life-interest to his mother and vested remainder in his favour. He also stated that his mother died on 17.12.2001. After the death of his mother, the petitioner became the absolute owner of the plaint schedule property. The respondent also set up another Will, dated 07.02.2000 allegedly executed by his father - Channa Viswanadham, and he is contesting the suit. But, in a suit for

injunction simpliciter, such questions cannot be decided and based on the judgment in **Peruri Manikyamba v. Agraharapu Veera Venkata Satyanarayana Murthy & another**¹, the petitioner has to seek relief of declaration of title and, therefore, he filed the petition for amendment of plaint, invoking the Order VI, Rule 17 of the Code.

3. The respondent filed counter denying the material allegations, *inter alia*, contending that the suit is coming on for continuation of arguments and at that stage the petitioner cannot be permitted to amend the plaint and that no satisfactory reasons are mentioned in the affidavit filed along with petition and that it will change the nature of suit claim and takes away the jurisdiction of Junior Civil Judge and in the event of permitting amendment, the Court has to frame an additional issue on receipt of additional written statement and both parties have to adduce evidence. Therefore, at the stage of arguments, no leave can be granted to amend the plaint by exercising power under Order VI, Rule 17 of the Code and prayed to dismiss the petition.

4. The trial Court accepting the respondent's contention dismissed the petition.

5. Aggrieved by the order, the present revision is filed, mainly on the ground that to avoid multiplicity of proceedings, amendment can be permitted at any stage of the proceedings and that the Will,

¹. 2013 (5) ALT 284 (DB)

dated 07.02.2000 was produced before the trial Court only during his examination and thereby he could not take necessary steps before commencement of trial and requested to set aside the order, permitting the petitioner to amend the plaint to seek additional claim of declaration of title to the property.

6. During hearing, the learned counsel for the petitioner, Sri T.V.S. Prabhakar Rao, reiterated the contentions urged in the revision, while placing reliance on the judgment in **Peruri Manikyamba¹**. The main contention of the petitioner to grant leave for amendment of plaint is only to avoid multiplicity of proceedings, and apart from that, according to Order VI, Rule 17 of the Code, at any stage of the proceedings, parties can be permitted to amend the pleadings. Therefore, dismissal of the petition filed under Order VI, Rule 17 of the Code by the trial Court is nothing but an erroneous exercise of discretion and the dismissal order is liable to be set aside.

7. Whereas, the learned counsel for the respondent supported the order impugned in this revision in all respects, while reiterating the contention that in the absence of any explanation for the delay, that too after commencement of trial and at the stage of arguments as to why he could not file a petition under Order VI, Rule 17 of the Code before commencement of trial, such petition cannot be allowed in view of the bar under proviso to Order VI, Rule 17 of the Code and requested to dismiss the revision, confirming the order passed by the trial Court.

8. It is an undisputed fact that the petitioner is claiming right over the plaint schedule property based on the Will, dated 10.06.1991, allegedly executed by his father creating life interest in favour of her mother and vested remainder in his favour and his mother died on 17.12.2001, whereas, the respondent also set up another Will, dated 07.02.2000 allegedly executed by his father - Channa Viswanadham, bequeathing the schedule property in his favour. Therefore, both the plaintiff and defendant are claiming title over the property in dispute based on two different Wills executed by their father on two different dates. In such case, the remedy available to the parties is to seek declaratory relief as there is a rival claim over the property. But, instead of filing suit for declaration, the petitioner filed the suit for injunction simpliciter, where title of the parties cannot be gone into, except incidentally to decide lawful possession of the party over the property as on the date of filing suit. But, the petitioner's endeavour is that he has to claim a declaratory relief in view of the law declared in **Peruri Manikyamba**¹, otherwise, the suit claim will be defeated. The respondent filed written statement as early as in the year 2010 itself setting up the Will, dated 07.02.2000 and issues were also framed long prior to commencement of trial, and when the trial was completed and posted for continuation of argument of plaintiff, the petitioner filed the petition seeking leave of the Court to amend the plaint to incorporate relief of declaration of title. Therefore, in the absence of any explanation for failure to claim such relief before commencement of trial despite exercising due diligence, the Court

cannot permit the parties to amend their pleadings in view of interdict created by proviso to Order VI, Rule 17 of the Code by amendment Act 22 of 2002. The petitioner in the entire affidavit did not state anything except the necessity to claim such a declaratory relief, but there was no reference about exercise of his due diligence and inability to bring those facts on record after commencement of trial before the trial Court. In the absence of such explanation for his failure to bring those facts on record before commencement of trial, the order passed by the trial Court cannot be interfered with by exercising power under Article 227 of the Constitution of India.

9. No doubt, the parties are entitled to amend their pleadings at any stage of the proceedings prior to amendment to the Code. But, by Act 22 of 2002, though original provision remains as it is, in view of addition of proviso to Order VI, Rule 17 of the Code, which takes away the right of parties to claim such amendments except where they fail to bring those facts on record before commencement of trial despite exercise of due diligence. Herein the case, there was no explanation as to the requirement under proviso to Order VI, Rule 17 of the Code. In such case, the petitioner is not entitled to claim the relief in the present case and the Hon'ble Supreme Court in **Revajeetu Builders and Developers v. Narayanaswamy & Sons and others**² held that to decide the scope of proviso to Order VI Rule 17 of the Code, laid down certain guidelines for granting or denying relief under Order VI Rule 17 of CPC viz., as follows:

² (2009) 10 SCC 84

“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.”

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."

10. Hon'ble Supreme Court in **J. Samuel v. Gattu Mahesh**³, 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"

The Apex Court observed that 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, and concluded that in the absence of

³ 2012 (2) SCC 300

explanation to establish that despite exercise of due diligence he could not bring those facts on record before commencement of trial. In view of the principles laid down in the above said judgments, it is difficult to accept the contention of the petitioner at this stage based on the principle laid down in **Peruri Manikyamba**¹. Hence, I find no illegality in the order impugned, warranting interference of this Court by exercising power under Article 227 of the Constitution of India since power is limited to keep the subordinate Courts under the control of High Court to act within their bounds of jurisdictional limits and not to allow them to transgress from their jurisdictional limits, but not otherwise. Therefore, the present revision is liable to be dismissed.

11. Accordingly, this Civil Revision Petition is dismissed. However, the trial Court is directed to dispose of the main suit, uninfluenced by any of the observations made herein above, independently. No order as to costs.

Consequently, Miscellaneous Petitions, if any, pending in the present revision, stand closed.

M. SATYANARAYANA MURTHY, J

November 8, 2018.

Mgr