

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.3407 of 2018

ORDER:

The unsuccessful 2nd defendant filed this Civil Revision Petition, under Article 227 of the Constitution of India, assailing the order, dated 06.04.2018, of the learned III Additional Junior Civil Judge, Ongole, passed in I.A.no.633 of 2017 in O.S.no.142 of 2010.

2. I have heard the submissions of *Sri Anup Koushik Karavadi*, learned counsel appearing for the revision petitioner/ 2nd defendant, ('2nd defendant', for brevity); and, of *Sri M.R.Srinivas*, learned counsel appearing for the respondents/ plaintiffs ('plaintiffs', for brevity). I have perused the material record.

3. The plaintiffs originally filed a suit for perpetual injunction in respect of three items respectively belonging to the three plaintiffs. The defendants having filed a written statement are resisting the suit. The trial in the suit is in progress. During the course of trial, the plaintiff filed I.A.no.633 of 2017 under Order VI Rule 17 read with Section 151 of the Code of the Civil Procedure, 1908, requesting for amendment of the plaint, as stated in the memo of amendment, which reads verbatim as under:

" 1. In para-2 of the plaint after first para add the following:-

" Subsequent to the suit, the defendants illegally in violation of the injunction orders trespassed into the suit schedule properties, made construction of compound wall from C1 to C2, from C2 to C3 in plot Nos.4, 5 & 6 as shown in the plaint plan belongs to the plaintiffs. So the defendants are liable to remove the wall constructed from C1, C2, C2, C3 in plot Nos.4, 5 & 6 shown in the plaint plan."

2. In Valuation & Court fee para, before “(a)” add the following:

(a1) The relief of mandatory injunction with respect to Item No.1 of suit schedule property, i.e., Plot No.4 shown in the plaint plan is valued at Rs.2,000/-, on which a court fee of Rs.186/- is herewith paid u/S26(c) of APCF and SV Act.

(a2) The relief of mandatory injunction with respect to Item No.2 i., e Plot No.5 is valued at Rs.2,000/-, on which a court fee of Rs.186/- is herewith paid u/S26(c) of APCF and SV Act.

(a3) The relief of mandatory injunction with respect to item No.3, i.e., plot No.6 is valued at Rs.2,000/-, on which a court fee of Rs.186/- is herewith paid u/S26 (c) of APCF and SV Act.”

The said interlocutory application was resisted by the 2nd defendant by filing a counter. On merits and by the orders impugned in this revision, the trial Court allowed the petition.

4. The case of the plaintiffs in support of the request for amendment of the plaint, in brief, is this:

They are the owners of the ~~plaint~~ schedule properties/ plots 4, 5 and 6, which are shown in the plaint plan. The suit is filed for perpetual injunction. The defendants filed a written statement. Along with the suit, the plaintiffs filed I.A.no.147 of 2010 for grant of temporary injunction. Temporary injunction was granted at the inception until further orders. The plaintiffs also filed an interlocutory application for appointment of an Advocate Commissioner. An Advocate Commissioner executed the warrant and filed a report. On the application of the plaintiffs, the same Commissioner was re-directed to measure the schedule property with the assistance of a Mandal Surveyor and fix boundaries. At that time, the defendants dug a trench from C, C1, C2, C3 and C4 points shown in the plaint plan. By the time the Commissioner visited, no constructions were made in the schedule

property. The plaintiffs are residing at various places. Since the plaintiff schedule property is a vacant site, there was no occasion for them to go to the schedule property. Though injunction order is in force, the defendants 1 & 2 constructed a wall in the site of the plaintiffs by digging a trench from C1 to C4 points shown in the plaintiff plan and through the plots of the plaintiffs shown in the plaintiff schedule. During the cross-examination, the defendants asserted the fact of making illegal construction by them in the site of the plaintiffs in violation of the injunction order. Subsequent to the second visit of the Commissioner along with the Mandal Surveyor, the property was measured and boundaries were fixed. The construction was made by the defendants subsequent to the suit in violation of the injunction orders. The defendants intentionally altered the physical features by making the construction in the plaintiff schedule plots. In view of the construction of the wall subsequent to the suit, it has become necessary to seek amendment of the plaintiff and mandatory injunction for removal of the construction made by the defendants in the plaintiff schedule plots of the plaintiffs.

5. Per contra, the case of the 2nd defendant, in her counter, in brief, is this:

The defendants constructed wall in their site by digging a trench from C1 to C4 through their plots. During the course of cross-examination, the defendants asserted that the averment relating to illegal construction in the site of the plaintiffs and the further averments that the construction was subsequent to the suit and that the defendants flouted the injunction orders and changed the physical features are all false allegations. Those allegations are invented for the purpose of this petition after completion of the evidence on the side of the plaintiffs.

The injunction order is not to interfere with the possession of the plaintiffs over their property, but not in respect of construction of wall. The interim injunction was granted on 05.03.2010. Till the year 2017, the defendants did not move their little finger regarding the alleged violation. The specific defence of the defendants is that as early as in the year 2010, the defendants constructed compound wall for their lands. They also filed separate plan along with the written statement. PW1 during the cross-examination admitted that the defendants constructed compound wall subsequent to the visit of the Advocate Commissioner. The Advocate Commissioner inspected the site, on 07.03.2010, and filed his report. The plaintiffs are not entitled to seek the relief of mandatory injunction since it is hopelessly barred by time. Even otherwise, the plaintiffs are not entitled to seek the relief after completion of their cross examination since the suit is very old and has come to the stage of disposal. If the amendment is allowed at this stage, it causes prejudice to the defence of the 2nd defendant. The plaintiffs came to court with *mala fide* intentions. Hence, the petition may be dismissed.

6. At the hearing, learned counsel for both the sides made submissions in line with the respective pleaded cases of the parties.

7. Now, the point for determination is - 'Whether the trial Court is justified in passing the impugned order permitting the amendment of the plaint as sought for by the plaintiffs?

8. Learned counsel for the revision petitioner-2nd defendant contended as follows:

The suit was filed in March, 2010. The 1st defendant has filed his written statement, on 30.06.2010, categorically stating that the

compound wall was constructed for the lands of the defendants. A separate plan is also filed along with the written statement. The Commissioner visited the property earlier. He again visited the property and stated that there is no change in the physical features after the first visit and till the date of the second visit. The allegation that the defendants made constructions subsequent to the suit is false. The plaintiffs have not filed any rejoinder to the written statement, though the written statement was filed in the year 2010 stating that the compound wall was in existence. They did not file photographs showing the physical features. The application for amendment is belatedly filed. The reliefs claimed by means of proposed amendment are hopelessly barred by time. Merely on the ground that the question of limitation is a mixed question of fact & law and that permitting the amendment is necessary to avoid multiplicity of proceedings, the trial Court allowed the request for amendment of the plaint, ignoring the facts of the case and evidence that was brought on record. In the cross-examination, PW1 deposed to the following effect: 'After the advocate commissioner's inspection, the defendants constructed the compound wall to some extent. It is true that subsequent to the advocate commissioner's visit the defendants have constructed the compound wall. I do not know the time of the construction of the said compound wall. As per the said construction of the compound wall the defendants occupied 20 feet of my site.' PW2 also sated in his cross-examination to the following effect: '...After the advocate commissioner's inspection, the defendants constructed the compound wall to some extent. It is true that subsequent to the advocate commissioner's visit the defendants have constructed the compound wall.' Hence, and in view of

the said admissions, the order of the trial Court is liable to be set aside.

The petition for amendment filed by the plaintiffs is liable for dismissal.

9. Learned counsel for the plaintiffs while supporting the orders of the Court below contended as follows: 'The plaintiffs filed the suit for perpetual injunction. Along with the suit, the plaintiffs filed the application for temporary injunction. The trial Court granted an *ex parte* interim injunction. During the first visit of the Commissioner and the second visit of the same Commissioner, after re-entrustment of the warrant, there was no change in the physical features of the property. The first visit was in the year 2010. The second visit of the Commissioner was on 10.12.2011. From the said facts and from the cross-examination of PWs 1 & 2, which are pointed out before this Court, by the 2nd defendant, it is clear that the constructions were made subsequent to 10.12.2011. However, no doubt, the plaintiffs are not aware of the date of commencement of the construction as they are living at different places and as they had no occasion to go to the plaint schedule property as it is a vacant site. The trial Court considered the facts and pleadings in correct perspective. By following the decisions of the Supreme court, the Court below held that the issue of limitation being a mixed question of fact & law, it need not be considered at the stage of allowing an application for amendment and that the plea of limitation could be made a subject matter of an issue, after allowing the amendment prayed for. The trial Court also held that allowing of the amendment in the facts and circumstances of the case is necessary to determine the real question in controversy between the parties and to avoid multiplicity of proceedings and that after the amendment is allowed, the defendants can be given an opportunity to file additional pleadings and to cross examine the plaintiffs and that if the amendment

is allowed, no prejudice would be caused to the defendants and that on the other hand, if the amendment is refused, the plaintiffs would suffer serious and irreparable loss. Therefore, the well-considered order of the Court below does not warrant interference. The revision is devoid of merit and is liable for dismissal.'

10. I have given earnest consideration to the facts & submissions. The plaintiffs having originally filed a suit for perpetual injunction sought a temporary injunction in respect of the plaint schedule plots. The 2nd defendant pleaded in her written statement that she constructed the compound wall. However, an Advocate commissioner appointed at the request of the plaintiffs visited the property and filed a report. And, the same Commissioner re-visited the schedule property, a second time, and filed a further report. According to his reports, there was no change of physical features from the time of his first visit and till his second visit. The plaintiffs are contending that subsequent to the said two visits of the Commissioner, the defendants dug trenches from C1 to C4 points shown in the plaint plan and made the construction by occupying portions of the properties/ plots of the plaintiffs and that therefore, they are constrained to seek amendment of the plaint to enable them to claim the relief of mandatory injunction for removal of constructions, which were made by the defendants in the plots of the plaintiffs, subsequent to the suit and in violation of the interim injunction orders. Whereas, the defendants main contention is that the amendment was sought belatedly though the written statement is filed in the year 2010 stating that a compound wall has already been constructed and that the proposed amendment is barred by law of limitation.

11. Having regard to the facts & submissions, it is to be first noted that the plaintiffs are seeking amendment of the plaint based on a

subsequent event, to enable them to claim the relief of mandatory injunction for removal of the constructions said to have been made in portions of the plots of the plaintiffs shown in the plaint plan by the defendants, after the institution of the suit & obtaining of *ex parte* order of injunction by them and subsequent to the visits of the Commissioner. In that view of the matter, the bar under the proviso to Order VI Rule 17 of the Code has no application to the facts of the case. Further, as already noted, the trial Court having adverted to the decision of the Supreme Court rightly held that the issue of limitation being a mixed question of fact & law, the plea of limitation could be made a subject matter of issue after allowing the amendment prayed for.

12. The pleadings and the evidence brought on record, on which the plaintiffs place reliance in support of their contentions apart, dealing with the question as to whether the constructions were made prior to the suit or after the suit, suffice if it is observed that as per the settled law, the merits of the amendment sought to be incorporated by way of amendment are not to be judged at the stage of allowing the prayer for amendment, [See: T.P.Palaniswami and another v. Deivanaiammal and others¹].

13. Dealing next with the aspect of delay in seeking the amendment, it is to be noted that in the decision in Sampath Kumar v. Ayyakannu², the trial Court rejected the application for amendment of pleadings on the ground of delay and the Madras High Court while dismissing the revision had confirmed the said order of the trial Court; however, the Supreme Court while setting aside the orders of the said two Courts and

¹ AIR 1984 MADRAS 19

² 2002 (6) ALD 63 (SC)= (2202) 7 SCC 559

permitting the amendment of the plaint, which was sought after about 11 years from the date of institution of the suit, had held as follows:

In the present case, the amendment is being sought for almost 11 years after the date of the institution of the suit. The plaintiff is not debarred from instituting a new suit seeking relief of declaration of title and recovery of possession on the same basic facts as are pleaded in the plaint seeking relief of issuance of permanent prohibitory injunction and which is pending. In order to avoid multiplicity of suits, it would be a sound exercise of discretion to permit the relief of declaration of title and recovery of possession being sought for in the pending suit. The plaintiff has alleged the cause of action for the reliefs now sought to be added as having arisen to him during the pendency of the suit. The merits of the averments sought to be incorporated by way of amendment are not to be judged at the stage of allowing prayer for amendment.

14. Further, in the decision in *Abdul Rehman and Another v. Mohd. Ruldu and Others*³, the Supreme Court has laid down that the parties to the suit are permitted to bring forward amendment of the pleadings at any stage of the proceeding for the purpose of determining the real question in controversy between them and that the Courts have to be liberal in accepting the same, if such application for amendment is made prior to the commencement of the trial and that if such application is made after the commencement of the trial, in that event, the Court has to arrive at a conclusion that, inspite of due diligence, the party could not have raised the matter before the commencement of the trial. Be it noted that the bar under the proviso to Order VI Rule 17 of the Code has no application to the facts of the case on hand, as the amendment of the plaint is being sought based on subsequent events.

15. In the above decision the Supreme Court reiterated the following propositions:

“All amendments which are necessary for the purpose of determining real questions of controversy between the parties

³ 2013(1) ALD 1(SC)

should be allowed if it does not change the basic nature of the suit.
A change in the nature of relief claimed shall not be considered as a change in the nature of suit and the power of amendment should be exercised in the larger interests of doing full and complete justice between the parties.”

Further, in the decision in Pankaja and another v. Yellapa⁴, having referred to various decisions, the Supreme Court held as follows:

“ If the granting of amendment really sub-serves the ultimate cause of justice and avoids further litigation, the same should be allowed.”

16. Therefore, for all the aforesaid reasons and the legal position obtaining, this Court finds that granting of the prayer for amendment of the plaint as was done by the trial Court sub-serves the ultimate cause of justice and avoids further litigation and that, therefore, the trial Court is justified in allowing the application filed by the plaintiffs for amendment of the plaint. On the above analysis, this Court holds that the order of the trial Court is sustainable both under facts and in law.

17. In the result, the Civil Revision Petition is dismissed.

There shall be no order as to costs.

Pending miscellaneous petitions, if any, in this revision shall stand closed.

M. SEETHARAMA MURTI, J

17.09.2018
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⁴ 2004 (6) SCC 415