

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL REVISION PETITION NO.1550 OF 2017

ORDER:

This petition is filed under Article 227 of the Constitution of India, challenging the order dated 05.01.2017 in I.A.No.977 of 2015 in O.S.No.83 of 2010 passed by the III Additional District Judge, Bhimavaram, West Godavari District allowing the amendment petition to amend the written statement filed, under Order VI Rule 17 read with Section 151 C.P.C granting leave add paras 12(a) to 12(o) in the written statement.

2. The respondents alleged that subsequent to the filing of written statement by the 1st defendant, the petitioner changed his advocate; subsequent to the filing of the suit, another suit was filed for recovery of unpaid purchase money; recently, it was found that original written statement filed by them did not contain certain facts and therefore, certain paragraphs have to be added to the written statement and that the proposed amendment would not change the nature of the defence; and thus, requested the Court to allow the application by granting leave to amend the written statement permitting to add paras 12(a) to 12(o).

3. The petitioner/plaintiff filed counter and the 4th respondent did not file counter, though sufficient opportunity was afforded and hence, his right to file counter was forfeited.

4. The petitioner mainly contended before the Court below that the proposed amendment would change the entire defence; when respondents earlier filed I.A.No.73 of 2012 under Order VIII Rule 9 C.P.C. to receive additional written statement, the same was permitted by the Court below, later in C.R.P.No.4875 of 2014, it was set aside by this Court on 01.07.2015; and hence, the respondents are disentitled to claim relief under Order VI Rule 17 C.P.C.

5. Upon hearing both counsel, the Court below observed that the respondents can raise such plea by invoking Order VI Rule 17 C.P.C., placing reliance in **Baldev Singh v Manohar Singh**¹.

6. Aggrieved by the impugned order passed by the Court below, the present revision petition is filed mainly on two grounds.

7. The first and foremost contention raised by learned counsel for the petitioner is that the proposed amendment is inconsistent to the admissions made in the original written statement; and the second ground is that when the trial has commenced and without satisfying the Court that the petitioner exercised due diligence in bringing certain facts raising certain pleas earlier to commencement of trial, the respondents are disentitled to claim relief under Order VI

¹ 2006(6) SCJ 305

Rule 17 C.P.C., in view of the bar under the proviso thereto and prayed to set aside the impugned order.

8. During hearing, learned counsel for the petitioner, Sri K.D.V.Prasad Rao, mainly contended that the proposed amendment would amount to withdrawing the admission and such amendments cannot be permitted; placed reliance on **Ram Niranjana Kajaria v Sheo Prakash Kajaria and others**² and **S.Malla Reddy v Future Builders Co-operative Housing Society and others**³. On the strength of principles laid down in the judgments prayed to dismiss the petition as the proposed amendment amount to withdrawal of admission made in the original written statement. In addition to the above, he contended that unless the petitioner satisfies the Court that in spite of exercise of due diligence, he could not take steps to amend the written statement, the respondents are disentitled to claim amendment in view of proviso to Order VI Rule 17 C.P.C. and prayed for dismissal.

9. Learned counsel for the respondents contended the proposed amendment would not amount to withdrawal of earlier admission since he did not seek for substitution of various paras in the place of paras 3 and 4 of the original written statement, but raised an inconsistent plea in the written statement and it does not amount to withdrawal of

² (2015) 10 SCC 203

³ 2013(4) ALD 40(SC)

any judicial admission made in the written statement. Apart from that the respondents exercised due diligence by filing an application under Order VIII Rule 9 C.P.C. to receive subsequent pleadings, but the Court below allowed, which was set aside by the revisional Court in C.R.P.No.4875 of 2014 while making an observation that the petitioner is entitled to invoke jurisdiction of the Court below under Order VI Rule 17 C.P.C. On the strength of the same, the respondents supported the order passed by the Court below.

10. Considering the rival contentions and perusing the material available on record, the point that arises for consideration is:

Whether the proposed amendment would amount to withdrawal of judicial admission made in the written statement in paras 3 and 4 and whether the petitioner exercised due diligence to bring these facts to the notice of the Court below by way of amendment, if not, such order can be sustained?

11. The respondents/defendants in the suit filed written statement in the month of June, 2011 and thereafter, issues were framed by the Court on 24.09.2014 and realising the mistake, the respondents filed petition under Order VIII Rule 9 C.P.C., to file additional written statement, which was allowed and later on challenge before the revisional Court, it was dismissed making observation that the petitioner can invoke jurisdiction of the Court under Order VI Rule 17

C.P.C. So, the main basis for filing the petition is the observation made in C.R.P.No.4875 of 2014. There is a stray observation in the order in C.R.P.No.4875 of 2014 at para 7 regarding entitlement of the petitioner to raise such pleas. But that observation would not entitle him to claim amendment of pleadings under Order VI Rule 17 C.P.C.

12. Similar question came up before the constitutional Bench of the Apex Court in **The State of Orissa v Sudhansu Sekhar Misra and others**⁴, wherein at para 13, it was held that a decision is only an authority it actually decides. What is of the essence in the decision is its ratio and not other observations found therein nor what logically follows from the various observations made in it placing reliance on **Quinn v. Leathem**⁵. The incidental observation in the revision would not form the basis for filing a petition under Order VI Rule 17 C.P.C. On the basis of such observation in para 7 of the order in C.R.P.No.4875 of 2014, the petitioner is disentitled to claim relief under Order VI Rule 17 C.P.C. Even if such observation confers right on the petitioner to seek amendment, it is always subject to the fetter under the proviso to Order VI Rule 17 C.P.C.

13. As per order VI Rule 17 C.P.C., the Court may, at any stage of the proceedings, allow either party to alter or amend

⁴ AIR 1968 647

⁵ 1901 AC 495

his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. However, the principles to allow petitions under Rule 17 Order 6 of C.P.C. are well settled i.e. the amendment shall not alter the basic structure or nature of the claim, and that the amendment shall not take away the valuable right accrued to the respondent or such amendment do not amount to withdrawal of unequivocal admissions made in the pleadings. However, by proviso to Rule 17 of Order VI of C.P.C, 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 inspite of due diligence, the party could not have raised the matter before commencement of trial.

14. In the present suit, written statement was filed in the month of June, 2011 and thereafter, respondents filed a petition under Order VIII Rule 9 C.P.C. seeking leave of the Court to receive additional written statement, which ended in dismissal before revisional Court in C.R.P.No.4875 of 2014. Thus, the respondents are aware of the mistake they committed and when an application was filed under Order VII Rule 9 C.P.C., the respondents waited till passing of order in C.R.P.No.4875 of 2014 and thereafter, filed petition under

Order VI Rule 17 C.P.C. Taking advantage of the observation in para 7 of the order in C.R.P.No.4875 of 2014. Therefore, the respondents are aware about the mistake in the written statement, but did not choose to amend the written statement under Order VI Rule 17 C.P.C.

15. While considering the application under Order VI Rule 17 C.P.C., the Apex Court explained the meaning of word 'due diligence' in **BHARAT PETROLEUM CORPORATION LTD., Vs. PRECIOUS FINANCE INVESTMENT Pvt.Ltd.**, ⁽⁶⁾ in W.P.No.2897 of 2006 (decided on 20.10.2006), Bombay High Court held at para 15, as follows:

"The Dictionary meaning of the expression "due diligence" as given in the Blacks Law Dictionary, Sixth Edition, 1990 means "Such a measure of prudence, activity or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case." Similarly the Law Lexicon by P.Ramanatha Aiyer, Second Edition (Reprint) 2001 explains "due diligence:" to mean such watchful caution and foresight as the circumstances of the particular case demands. While examining the explanation offered or cause shown as to why in spite of due diligence a party could not have raised the matter before commencement of trial, the Court may have to see the circumstances in which the party is seeking amendment. In short the explanation as to "due diligence" depends upon the particular circumstances and the relative facts of each case to reach a conclusion one way or the other."

⁶ MANU/MH/1328/2006

If the definition of the word 'due diligence' incorporated, the proviso to Order VI Rule 17 C.P.C. would apply to the present facts of the case, and the respondents failed to exercise due diligence as an ordinary prudent man and waited till passing of the order in C.R.P.No.4875 of 2014, which indicates that the respondents did not exercise due diligence.

16. In fact, PWs.1 to 3 were already examined by the date of filing the petition before the Court below. Therefore, the trial has already commenced and, in such a case, it is the duty of the petitioner to satisfy the Court that he has exercised due diligence, but could not raise such plea in the written statement. The Apex Court, while deciding an identical question in **Revajeetu Builders and Developers v. Narayanaswamy and Sons and others**⁷, laid down certain guidelines for granting or denying relief under Order VI Rule 17 of CPC viz., as follows:

“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;*

⁷ (2009) 10 Supreme Court Cases 84

(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.

17. In the same judgment at para 24 the Apex Court held as follows:

"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."

18. In view of the guidelines laid down by the Apex Court in **Revajeetu Builders and Developers**³ case, the Court has to examine whether the proposed amendment would fall within the parameters laid down by the Apex Court and, if the proposed amendment is not within the parameters laid down, the Court is bound to reject the amendment.

19. In latter judgment, in **Rajkumar Guruwara (dead) through LRs v. S.K. Sarwagi and Company Private Limited and another**⁸, the Apex Court had an occasion to deal with the proviso to Order VI Rule 17 C.P.C for amendment of plaint after commencement of trial and its permissibility. In paragraph 13 of the judgment, the Apex Court held that, to

⁸ (2008) 14 Supreme Court Cases 364

put it clear, Order VI Rule 17 C.P.C. confers jurisdiction on the Court to allow either party to alter or amend his pleadings at any stage of the proceedings on such terms as may be just. Such amendments seeking determination of the real question of the controversy between the parties shall be permitted to be made. Pre-trial amendments are to be allowed liberally than those which are sought to be made after the commencement of the trial, as rightly pointed out by the High Court in the former case, the opposite party is not prejudiced because he had an opportunity of meeting the amendment sought to be made and, in the latter case, namely, after the commencement of trial, particularly, after completion of the evidence, the question of prejudice to the opposite party may arise and in such event, it is incumbent on the Court to satisfy the conditions prescribed in the proviso. In the said judgment, no guidelines were laid down by the Supreme Court as to the date of commencement of trial, but concluded that only after completion of evidence, prejudice to the opposite party may arise, and in such an event, the proviso to Order VI Rule 17 C.P.C is required to be considered by the Courts while exercising power under Order VI Rule 17 C.P.C.

20. Admittedly, the plaintiff's evidence was closed by the date of filing the petition under Order VI Rule 17 C.P.C. and it certainly causes prejudice to the respondents even if the principles laid down in the judgments are applied. In earlier

judgment in **Salem Advocate Bar Association, Tamil Nadu v. Union of India**⁹, wherein the Apex Court, while dealing with amendment to various provisions of C.P.C by Act 22 of 2002 w.e.f.01.07.2002, in paragraph 26 of the judgment, highlighted the purpose of incorporating proviso by Act 22 of 2002 and held that the proviso to some extent curtails absolute discretion of Court to allow amendment at any stage. For amendments sought after commencement of trial, it has to be shown that inspite of due diligence amendment sought could not have been sought earlier and the object is to prevent frivolous applications filed to delay trial.

21. If these principles are applied to the present facts of the case as the respondents though conscious about the mistake, he filed petition under VIII Rule 9 C.P.C. seeking leave to file additional written statement without raising the facts in the proposed amendment and resorted to file petition under Order VIII Rule 9 C.P.C., which ended in dismissal by the revisional Court. Despite knowledge about the failure to raise such plea, he did not choose to file an application under Order VI Rule 17 C.P.C. and the affidavit is totally silent as to exercise of due diligence as required under Order VI Rule 17 C.P.C. In the absence of any explanation to satisfy the Court that, despite exercise of due diligence, he could not have amended the written statement. Therefore, on this ground

⁹ (2005) 6 Supreme Court Cases 344

alone, the petition is liable to be dismissed, the Court below did not take into consideration, the proviso under Order VI Rule 17 C.P.C. and committed an error. The Court below simply passed its order on the observations made by the revisional Court. Therefore, the impugned order is illegal and contrary to the proviso under Order VI Rule 17 C.P.C.

22. The other ground raised by learned counsel for the petitioner is that the proposed amendment would amount to withdrawing of the unequivocal judicial admission in the original written statement. In fact, it is not his case that the petitioner wanted to substitute certain paras in the place of original paras in the written statement, but he raised additional contentions, adding paras 12(a) to 12(o), raising several pleas inconsistent to the earlier plea. The principles applicable for amendment of the written statement are identical to the general principles applied to the amendment of pleadings and the defendant is entitled to raise inconsistent pleas. But he has to confine to any one of the pleas during trial and the respondents cross examined the plaintiffs witnesses based on the original plea, he ought not to have resorted to invoke Order VI Rule 17 C.P.C., which would take away the valuable right of the petitioner. Therefore, such amendment, though inconsistent, cannot be allowed in view of the prejudice being caused in view of the Judgment of

the Apex Court in **Revajeetu Builders's** case and **Rajkumar Guruvara** case, referred supra.

23. Learned counsel for the petitioner relied on judgments of this Court and the Apex Court to contend that the amendment cannot be permitted to withdraw the admissions. But in view of my findings, these questions needs no further probe as the petition itself is not maintainable in view of the proviso to Order VI Rule 17 C.P.C. and consequently, the petition is liable to be dismissed.

24. In the result, the civil revision petition is allowed setting aside the order dated 05.01.2017 in I.A.No.977 of 2015 in O.S.No.83 of 2010 passed by the III Additional District Judge, Bhimavaram and the same is dismissed. There shall be no order as to costs.

Consequently, miscellaneous applications pending if any, shall also stand dismissed.

M. SATYANARAYANA MURTHY,J

Date: 07.02.2018
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